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No. 11445

V. 245-4
United States

Circuit Court of Appeals

For the Ninth Circuit.

STUART OXYGEN COMPANY, LTD., a corporation,

Appellant,

vs.

WILLIAM JOSEPHIAN,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 195

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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FEB 20 1947

PAUL P. O'BRIEN,



No. 11445

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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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2607 Russ Building,
San Francisco, California.

Attorneys for Defendant and Appellant.

BOYKEN, MOHLER & BECKLEY,

723 Crocker Building,
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the United States District Court
for the Northern District of California,
Southern Division

Civil Action No. 25286-G
Suit for Infringement of
Patent No. 2,317,064

WILLIAM JOSEPHIAN,

Plaintiff,

vs.

STUART OXYGEN CO., LTD.,

Defendant.

COMPLAINT

Now Comes Plaintiff and for cause of action
alleges:

I.

Plaintiff, William Josephian, is a citizen of the
United States and a resident of Oakland, California.

II.

Defendant, Stuart Oxygen Co. Ltd., so Plaintiff
is informed and believes, is a corporation duly
organized and existing under the laws of the State
of California, and has its principal place of busi-
ness at San Francisco, California. [1*]

III.

The jurisdiction of this Court is based upon the
patent laws of the United States.

*Page numbering appearing at foot of page of original certified
Transcript.

IV.

On April 20, 1943, United States Letters Patent No. 2,317,064 were duly and legally issued to Plaintiff for an invention in a tank truck, and since that date Plaintiff has been and still is the owner of those Letters Patent.

V.

Defendant has for a long time past been and still is infringing those Letters Patent by making and using tank trucks embodying the patented invention and will continue to do so unless enjoined by this Court.

VI.

Plaintiff has notified Defendant, both orally and in writing, that the tank trucks manufactured and used by said Defendant are infringements of such Letters Patent.

Wherefore, Plaintiff demands an injunction against further infringement by Defendant, an accounting for profits and damages, and an assessment of costs against defendant.

/s/ WILLIAM JOSEPHIAN,
Plaintiff.

/s/ A. W. BOYKEN of
BOYKEN, MOHLER &
BECKLEY,

/s/ REGINALD L. VAUGHAN,
Attorneys for Plaintiff.

Dated: Nov. 1st, 1946.

[Endorsed]: Filed Nov. 1, 1945. [2]

[Title of District Court and Cause.]

ANSWER

Now comes defendant, and for Answer to the Complaint in the above-identified action denies and alleges as follows:

I.

Answering paragraph I of the Complaint herein, defendant admits the allegations thereof.

II.

Answering Paragraph II of the Complaint herein, defendant admits the allegations thereof.

III.

Answering paragraph III of the Complaint herein, defendant admits the allegations thereof.

IV.

Answering paragraph IV of said Complaint, defendant [3] admits that Letters Patent No. 2,317,064 were issued to plaintiff on April 20th, 1943, for a "Tank Truck"; but defendants have no information or belief upon the remaining allegations and statements of said paragraph of the Complaint sufficient to enable them to answer and therefore deny each and every allegation and statement therein contained which is not herein specifically admitted to be true.

V.

Answering paragraph V of said Complaint, defendant denies each and every allegation and state-

ment made therein; and further answering said paragraph, states that defendant has made and used gas cylinder holders, but that the gas cylinder holders made and used by defendant are entirely different in construction and mode of operation from the tank truck shown and described in the patent sued upon, and defendant's gas cylinder holders do not embody the alleged invention patented in the patent sued upon, nor does the manufacture and use of such gas cylinder holders by defendant infringe any legal and valid claims of the patent in suit.

VI.

Answering paragraph VI of the Complaint, defendant admits the receipt on or about May 9th, 1945, of a letter directed to defendant from one Charles O. Bruce as attorney for plaintiff, which letter alleged infringement of the patent in suit by the manufacture and use by defendant of certain gas cylinder holders; and further answering said paragraph, defendant alleges that on or about May 15th, 1945, defendant responded to the aforesaid letter, stating that defendant's gas cylinder holders did not infringe any claims of the patent in suit; that notwithstanding said response, defendant received a further [4] letter on or about October 26th, 1945, from A. W. Boyken as attorney for plaintiff, alleging infringement of the patent in suit by the manufacture and use by defendant of the aforesaid gas cylinder holders; and that without affording defendant a reasonable opportunity to respond to said last mentioned letter, plaintiff in-

stituted the present suit within one week after the date of transmission thereof.

Further Answering Said Complaint, Defendant Alleges As Follows:

VII.

Defendant alleges that when the scope and meaning of the respective claims of the Letters Patent in suit are determined and resolved by reference to the specification of said Letters Patent and to the art existing at and prior to the alleged invention of the subject matter of the claims of said Letters Patent by the patentee thereof, each and every of the claims will be susceptible only of such narrow interpretation, meaning and scope that no act done or intended to be done by defendant as charged by plaintiff can be held to constitute an infringement of any of the claims of said Letters Patent.

VIII.

Defendant alleges that ever since the grant of the Letters Patent in suit plaintiff has been manufacturing and using the tank truck patented in said Letters Patent, but has failed to give sufficient notice to the public that the same are patented by affixing thereon the word "Patent" together with the number of the patent.

Wherefore Defendant Prays That the Complaint herein may be dismissed [5] with defendant's costs and charges in this behalf most wrongfully sustained.

Dated: December 10th, 1945.

NAYLOR and LASSAGNE,
THEODORE H. LASSAGNE,
THACHER, JONES & CASEY,
THOMAS A. THACHER,
Attorneys for Defendant.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing Answer is acknowledged this 10th day of December, 1945.

BOYKEN, MOHLER &
BECKLEY,
A. W. BOYKEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 10, 1945.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To the Plaintiff Above-Named and to Boyken,
Mohler & Beckley, A. W. Boyken and Reginald
L. Vaughan, His Attorneys:

In accordance with the provisions of Rule 36 of the Federal Rules of Civil Procedure, defendant hereby requests plaintiff to admit the truth of the following facts within ten days after service of this request, for the purposes of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. A truck for handling a plurality of gas cylin-

ders manifolded together as shown in the photographs attached hereto as Exhibits A-1; A-2; A-3; and A-4 was used publicly in Oakland, California, and vicinity, by the [6a] defendant, Stuart Oxygen Co., Ltd., commencing on or about January 1, 1941, and more than one year prior to the filing of application for the patent in suit.

2. A holder for a plurality of gas cylinders manifolded together as shown in the photograph attached hereto as Exhibit B-1, and a truck for handling said holder as shown in the photographs attached hereto as Exhibits B-2 and B-3 were publicly used in Los Angeles, California, and vicinity by Home Oxygen Company commencing on or about January 1, 1941, and more than one year prior to the filing of application for the patent in suit.

3. Holders for gas cylinders as indicated by red arrows on the photographs attached hereto as Exhibits C-1; C-2; C-3; and C-4 were publicly used in the City and County of San Francisco, California; in South San Francisco; San Mateo County, California, and vicinity, by Western Pipe and Steel Company commencing on or about February 15, 1940, and more than one year prior to the filing of application for the patent in suit.

Dated: January 16th, 1946.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
THACHER, JONES & CASEY,
/s/ THOMAS A. THACHER,
Attorneys for Defendant.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing is acknowledged this 16th day of January, 1946.

BOYKEN, MOHLER &
BECKLEY,

/s/ A. W. BOYKEN,

/s/ REGINALD L. VAUGHAN,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 17, 1946. [6b]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

An injunction may issue as prayed for in the complaint, with costs to plaintiff.

The Court is of the opinion that the evidence does not warrant an order for an accounting for profits and damages and that the injunctive relief allowed is the proper remedy.

Dated: May 6, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed May 6, 1946. [7]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the Court on April 30 and May 1, 1946, and witnesses having testified in open Court on behalf of the respective parties, and evidence submitted, and arguments having been made by the attorneys for both parties, and said cause having been submitted to the Court,

Now, therefore, the Court having been fully advised and having entered its Order for Judgment, dated May 6, 1946, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. This cause was brought on November 1, 1945 under the Patent Laws of the United States for the infringement of United States Letters Patent No. 2,317,064 issued April 20, 1943 to William Josephian. [8]

2. Plaintiff, William Josephian, was at the time this action was brought and still is a resident of Oakland, California.

3. Defendant, Stuart Oxygen Co., Ltd., was at the time this action was brought and still is a corporation duly organized and existing under the laws of the State of California and had at the time this action was brought and still has its principal place of business in San Francisco, California.

4. The invention disclosed and claimed in United States Letters Patent No. 2,317,064 is the sole invention of William Josephian and was, at the time made by him, new and useful; and the said patent and invention are now owned by him.

5. The device disclosed in said patent is novel and useful in that heavy cylinders are grouped together in a unit, movable by one man, and the unit possesses such maneuverability without losing balance and tipping over.

6. Plaintiff, William Josephian, has, since January 1942, made and used many hundreds of devices embodying the invention in said Letters Patent in his oxygen business.

7. The said patent was issued by the United States Patent Office without citing any prior art and with seven of the eight claims originally included in the application.

8. None of the devices shown in the photographs introduced in evidence as defendant's Exhibits A-1, A-2, A-3, B-1, B-2, B-3, B-4, C-1, C-2, C-3 and C-4, show the structure disclosed in said Letters Patent nor do any have the means to permit maneuvering of the unit as set forth in said Letters Patent.

9. No other prior uses, inventions, knowledge, or art, other than the defendant's exhibits mentioned in paragraph 8 above, were submitted for the Court's consideration either by the pleadings or the evidence.

10. The defendant has, since 1945, manufac-

tured and used approximately one hundred (100) devices like that in evidence as [9] plaintiff's Exhibit 7, for which has been substituted herein Photographs 7A and 7B filed May 13, 1946, which devices accomplish the same result as the device disclosed in said Letters Patent in substantially the same way.

11. Jack Molinari assisted William Josephian in constructing units of the invention disclosed and claimed in said Letters Patent and later was employed by defendant to design and construct for the defendant units like plaintiff's Exhibit 7; and said Molinari and defendant's employees did design and construct said units with knowledge of the plaintiff's invention and Letters Patent.

12. Plaintiff's Exhibit 7 has a "second stable position" when resting simultaneously on the edge of the base plate and on the circular depression formed in said base plate.

13. Plaintiff's Exhibit 7 will remain in a stationary stable position when resting simultaneously on the edge of the base plate and on the circular depression formed in said base plate, if the floor or other support on which the unit rests is raised as little as $\frac{3}{16}$ inches at the point of contact of said depression with said floor or other support.

14. The circular depression in the bottom of the base plate of plaintiff's Exhibit 7, for which has been substituted herein photographs 7A and 7B, is the substantial equivalent of and performs

the same function as the circular track disclosed in said Letters Patent.

Conclusions of Law

1. This Court has jurisdiction of the parties and subject matter herein.

2. Plaintiff is the legal owner of United States Letters Patent No. 2,317,064.

3. United States Letters Patent No. 2,317,064 are good and valid in law. [10]

4. The phrase "stable position", as used in said Letters Patent, refers to a position occupied by said truck in which a material increase in force is required to cause further motion of said truck in the direction of upset.

5. Defendant has, with knowledge and notice of said Letters Patent, infringed claims 1, 2, 3, 4 of United States Letters Patent No. 2,317,064 by manufacturing and using devices like that in evidence as plaintiff's Exhibit 7, for which has been substituted herein Photographs 7A and 7B filed May 13, 1946.

6. Defendant, its agents, servants, employees, attorneys and those in active concert with or participating with it, shall be perpetually enjoined and restrained (1) from directly or indirectly infringing upon United States Letters Patent No. 2,317,064, (2) from making or causing to be made, or selling or causing to be sold, or using or causing to be used, devices like or similar to that in evidence

as plaintiff's Exhibit 7, for which has been substituted herein Photographs 7A and 7B filed May 13, 1946, and (3) from disposing of such devices as defendant may now possess as complete units or with knowledge that they shall be subsequently used.

7. Plaintiff shall recover from defendant, Stuart Oxygen Co., Ltd., his costs of suit and disbursements.

/s/ LOUIS E. GOODMAN,
Judge.

Not approved as to form:

/s/ NAYLOR & LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

Receipt of a copy of the above is acknowledged this 13th day of May, 1946.

/s/ NAYLOR & LASSAGNE,
Attorneys for Defendant.

[Endorsed]: Filed May 23, 1946. [11]

In the United States District Court for the
Northern District of California
Southern Division

Civil Action No. 25286-G
Suit for Infringement of
Patent No. 2,317,064

WILLIAM JOSEPHIAN,

Plaintiff,

vs.

STUART OXYGEN CO., LTD.,

Defendant.

FINAL JUDGMENT

This cause having been heard by this Court on the pleadings herein and thereupon, upon consideration thereof, the Court having entered its Order for Judgment and its Findings of Fact and Conclusions of Law, it is now

Ordered, adjudged and decreed as follows:

1. That plaintiff is the legal owner of United States Letters Patent No. 2,317,064 issued April 20, 1943 to plaintiff and that said Letters Patent are good and valid in law.

2. That defendant has since 1945 infringed said Letters Patent by making and using devices like that introduced in evidence as plaintiff's Exhibit 7 for which has been substituted photographs 7A and 7B filed May 13, 1946. [12]

3. A writ of injunction shall issue under the

seal of this Court directed against the defendant, its agents, servants, employees, attorneys, and those in active concert or participating with it perpetually enjoining and restraining them (1) from directly or indirectly infringing said Letters Patent, (2) from making or causing to be made, selling or causing to be sold, or using or causing to be used devices like or similar to that in evidence as Plaintiff's Exhibit 7 for which has been substituted photographs 7A and 7B filed May 13, 1946, and (3) from disposing of such devices as defendant may now possess as complete units or with knowledge that they shall be subsequently used.

4. That the plaintiff herein recover from said defendant the costs in this case to be taxed up to and including the entry of this judgment and the issuance and service on defendant of the injunction herein provided; and that execution issue therefor.

5. The costs shall be taxed at \$172.89.

/s/ LOUIS E. GOODMAN,
Judge.

Dated: May 23, 1946.

[Endorsed]: Filed and entered May 23, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73(b) OF
RULES OF CIVIL PROCEDURE

Notice is hereby given that Stuart Oxygen Company, Ltd., the defendant above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the parts of the final judgment entered in this action on May 23rd, 1946, which adjudge as follows:

“2. That defendant has since 1945 infringed said Letters Patent (No. 2,317,064) by making and using devices like that introduced in evidence as plaintiff’s Exhibit 7 for which has been substituted herein photographs 7A and 7B filed May 13, 1946.

“3. A writ of injunction shall issue under the seal of this Court directed against the defendant, its agents, servants, employees, attorneys, and those in active concert or participating with it perpetually enjoining and restraining [14] them (1) from directly or indirectly infringing said Letters Patent, (2) from making or causing to be made, selling or causing to be sold, or using or causing to be used devices like or similar to that in evidence as Plaintiff’s Exhibit 7 for which has been substituted herein photographs 7-A and 7-B filed May 13, 1946, and (3) from disposing of such devices as defendant may now possess as complete units or with knowledge that they shall be subsequently used.

“4. That the plaintiff herein recover from said defendant the costs in this case to be taxed up to

and including the entry of this judgment and the issuance and service on defendant of the injunction herein provided; and that execution issue therefor.”

Dated: July 19th, 1946.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

THATCHER, JONES & CASEY,
THOMAS A. THATCHER,
Of Counsel.

[Endorsed]: Filed July 19, 1946. [15]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75

The defendant-appellant above named, in compliance with Rule 75 of the Federal Rules of Civil Procedure, hereby designates for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action.

Dated July 19th, 1946.

NAYLOR AND LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

THATCHER, JONES & CASEY,
THOMAS A. THATCHER,
Of Counsel.

Acknowledgment of Service

Receipt of a copy of the foregoing Designation of Contents of Record on Appeal under Rule 75 is acknowledged this 19th day of July, 1946.

BOYKEN, MOHLER &
BECKLEY,
W. BRUCE BECKLEY,
Attorneys for Plaintiff.

[Endorsed]: Filed July 20, 1946. [16]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know all men by these presents:

That The Travelers Indemnity Company, of Hartford, Connecticut, a stock insurance company duly licensed to transact business in the State of California, is held and firmly bound unto William Josephian, plaintiff in the above-entitled case, in the full and just sum of Five Thousand Two Hundred Fifty Dollars (\$5,250.00) to be paid to said plaintiff, his executors, administrators, or assigns, for which payment well and truly to be made The Travelers Indemnity Company binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such:

That whereas Stuart Oxygen Company, Ltd., a corporation duly organized and existing under the laws of the State of California, is about to take an appeal to the United [17] States Circuit Court

of Appeals for the Ninth Circuit to reverse the judgment made and entered on May 23rd, 1946 by the United States District Court for the Northern District of California, Southern Division, in the above-entitled case.

Now, therefore, if the above-named Stuart Oxygen Company, Ltd., shall prosecute said appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed, and dated this 19th day of July, 1946.

THE TRAVELERS
INDEMNITY COMPANY,
By D. L. CLARK,
Attorney in Fact.

Bond No. 123579.

Examined and recommended for approval.

THEODORE H. LASSAGNE,
Attorney for Appellant.

Bond approved July 22, 1946.

GOODMAN,
District Judge.

(Verification of surety.)

[Endorsed]: Filed July 22, 1946. [18]

[Title of District Court and Cause.]

WRIT OF INJUNCTION

The President of the United States of America, to Stuart Oxygen Co., Ltd., a corporation, defendant above named, its agents, servants, employees, attorneys, those in active concert or participating with it, and all those claiming by, through or under it.

Greetings:

Whereas, by a decree and final judgment entered herein on May 23, 1946, it appears that United States Letters Patent No. 2,317,064 is valid and infringed by defendant and by said judgment it was ordered that a perpetual injunction issue out of and under the seal of this Court against the defendant, Stuart Oxygen Co., Ltd., its agents, servants, employees, attorneys, and those in active concert and participating with it.

Now, therefore, you are hereby perpetually enjoined and restrained:

(1) From directly or indirectly infringing said letters Patent, [19]

(2) From making or causing to be made, selling or causing to be sold, or using or causing to be used devices like or similar to that in evidence as Plaintiff's Exhibit 7, and

(3) From disposing of such devices as you may

now possess as complete units or with knowledge that they shall be subsequently used.

Witness, the Honorable Louis E. Goodman, Judge of the United States District Court for the Northern District of California, and the seal of said Court affixed this 19th day of July, 1946.

[Seal] /s/ C. W. CALBREATH,
Clerk.

(Return of service of writ.)

[Endorsed]: Filed July 23, 1946. [20]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO
VACATE SUPERSEDEAS BOND

Please take notice that the undersigned will move this Court, at Room 258, United States Post Office Building, San Francisco, on the 5th day of August, 1946, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order vacating the Supersedeas Bond dated July 19, 1946 and the approval granted by this Court on July 22, 1946 and for an order setting forth the conditions under which supersedeas will be granted.

The grounds for such motions are that the present bond is insufficient in the following particulars:

1. Plaintiff was not given notice as to when defendant would move the Court for approval.

2. The conditions set forth in the present bond do not conform to the statements made in open court on June 10, 1946 and as set forth in a letter of the same date from plaintiff's attorney to defendant's attorney, a copy of which is attached hereto.

A draft of the order requested is submitted herewith.

See Moore's Federal Practice, Vol. 4, pp. 664-665.

BOYKEN, MOHLER &
BECKLEY,
A. W. BOYKEN,
W. BRUCE BECKLEY,
REGINALD L. VAUGHAN,
Attorneys for Plaintiff.

Receipt of a copy of the above acknowledged this 24th day of July, 1946.

NAYLOR AND LASSAGNE,
THEODORE H. LASSAGNE,
Attorneys for Defendant.

[Endorsed]: Filed July 24, 1946. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING
APPEAL

Good cause appearing therefor, attendant upon the preparation of the transcript of the record on appeal, it is hereby

Ordered that the time for docketing the appeal in the above-entitled cause may be and the same is hereby extended to and including September 27th, 1946.

Dated: August 27, 1946.

A. F. ST. SURE,
U. S. District Judge.

No previous extension by order or stipulation.

NAYLOR & LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 27, 1946. [23]

[Title of District Court and Cause.]

ORDER STAYING INJUNCTION AND
FIXING TERMS OF STAY BOND

Defendant having taken an appeal from the final judgment entered herein enjoining defendant from further infringing the patent in suit, now, therefore, in accordance with Rule 62(c) of the Federal Rules of Civil Procedure, it is hereby

Ordered that said injunction be and the same is hereby suspended during the pendency of said appeal, but only on the following conditions:

That defendant, within five days, furnishes a good and sufficient undertaking conditioned that defendant will pay to plaintiff, if said appeal is

dismissed or if the [24] judgment herein is affirmed, a royalty for all infringing devices made, used or sold by defendant during pendency of appeal, in an amount to be fixed by the court, after notice to the parties, not exceeding, however, the total sum of \$5,000.00.

Dated: September 23, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 23, 1946. [25]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR
FILING UNDERTAKING

It is hereby stipulated by and between the parties hereto, by their attorneys, that the Defendant may have to and including October 3, 1946, within which to file the undertaking required by the Order of this Court dated September 23, 1946, in this action.

Dated: This 25th day of September, 1946.

BOYKEN, MOHLER &
BECKLEY,
MARK MOHLER,
Attorney for Plaintiff.

THEODORE H. LASSAGNE,
Attorney for Defendant.

[Endorsed]: Filed Sept. 26, 1946. [26]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellant herein may have to and including October 17, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 27, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 27, 1946. [27]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That The Travelers Indemnity Company, of Hartford, Connecticut, a stock insurance company duly licensed to transact business in the State of California, is held and firmly bound unto William Josephian, plaintiff in the above entitled-case, in the full and just sum of Five Thousand Two Hundred Fifty Dollars (\$5,250.00) to be paid to said plaintiff, his executors, administrators, or assigns, for which payment well and truly to be made The Travelers Indemnity Company binds itself, its successors and assigns firmly by these present.

The condition of the above obligation is such:

That whereas Stuart Oxygen Company, Ltd., a

corporation duly organized and existing under the laws of the State of California, is about to take an appeal to the United [28] States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered on May 23rd, 1946 by the United States District Court for the Northern District of California, Southern Division, in the above-entitled case.

Now, therefore, if the above-named Stuart Oxygen Company, Ltd., shall prosecute said appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, and shall pay to plaintiff a royalty for all infringing devices made, used or sold by defendant during pendency of the appeal, in an amount to be fixed by the court, after notice to the parties, not exceeding, however, the total sum of Five Thousand (\$5,000.00) Dollars, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed, and dated this 19th day of July, 1946.

THE TRAVELERS INDEMNITY COMPANY,

(Seal) /s/ By D. L. CLARK,

Attorney in Fact.

Bond No. 123579.

Examined and recommended for approval,
/s/ THEODORE H. LASSAGNE,
Attorney for Appellant.

Approved:

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

(Verification of Surety.)

[Endorsed]: Filed Oct. 2, 1946. [29]

[Title of District Court and Cause.]

ORDER APPROVING SUPERSEDEAS BOND

Defendant having filed herein a Supersedeas Bond conditioned as provided in the Order Staying Injunction and Fixing Terms of Stay Bond dated September 23, 1946:

It is hereby ordered:

1. That the said Supersedeas Bond be and the same is hereby approved; and

2. That the previously filed Supersedeas Bond approved by this Court on July 22nd, 1946 be and the same is hereby exonerated, and the original thereof may be delivered to defendant.

Dated at San Francisco, California, this 2nd day of October, 1946.

LOUIS E. GOODMAN,
U. S. District Court Judge.

[Endorsed]: Filed Oct. 2, 1946.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL PAPERS AND EXHIBITS

It appearing that it is desirable that certain original papers and exhibits on file in the above-identified action should be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, a Notice of Appeal to that Court having been filed in this action:

It is hereby ordered, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals of the Ninth Circuit:

1. Request for Admissions;
2. Substitution of Photographs for Physical Exhibits; [31]
3. Original transcript of testimony given and proceedings had at the trial; and
4. Originals of all exhibits

which papers and exhibits may be held by the Clerk of the Circuit Court of Appeals for the Ninth Circuit pending the appeal, and to be returned to the Clerk of this Court thereafter unless otherwise provided by rule or order of said appellate court.

It is further ordered that, pursuant to the stipulation of the parties, defendant-appellant need not file two copies of the Reporter's Transcript as provided for in Rule 75(b).

Dated at San Francisco, California, this 2nd day of October, 1946.

LOUIS E. GOODMAN,
U. S. District Judge. [32]

[Title of District Court and Cause.]

STIPULATION RE TRANSCRIPT

It is hereby stipulated by the parties hereto, by their attorneys, that in the matter of the pending appeal herein defendant-appellant need not file two copies of the Reporter's Transcript as provided for in Rule 75(b).

Dated at San Francisco, California, this 7th day of September, 1946.

NAYLOR & LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

BOYKEN, MOHLER &
BECKLEY,

/s/ W. BRUCE BECKLEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 2, 1946. [33]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 33 pages, numbered 1 to 33, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of William Josephian, Plaintiff, vs. Stuart Oxygen Co., Ltd., Defendant, Civil No. 25286 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.30 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 14th day of October A. D. 1946.

(Seal)

C. W. CALBREATH,
Clerk,

/s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Tuesday, April 30, 1946

Appearances:

For Plaintiff A. W. Boyken, Esq., Reginald L. Vaughan, Esq., W. Bruce Beckley, Esq.

For Defendant: Theodore H. Lassagne, Esq. and Messrs. Thacher, Jones & Casey. By Harrison A. Jones, Esq.

The Clerk: Josephian vs. Stuart Oxygen Co.

Mr. Boyken: Ready for the plaintiff.

Mr. Lassagne: Ready for the defendant. [1*]

WILLIAM JOSEPHIAN

the plaintiff, called in his own behalf; sworn.

The Clerk: Will you state your name?

A. William Josephian.

Direct Examination

Mr. Boyken: Q. Mr. Josephian, are you the plaintiff in this action? A. Yes, sir.

Q. And your name is William Josephian?

A. Yes, sir.

Q. You reside in Oakland, California?

A. Yes.

Q. What line of business are you in?

A. In the manufacture of oxygen gas and acetylene——

Q Under what name?

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of William Josephian.)

A. Pacific Oxygen Company.

Q. What is the address of the Pacific Oxygen Company?

A. 2205 Magnolia Street, Oakland 7, California.

Q. Was Patent No. 2,317,064 issued to you?

A. Yes.

Q. Are you still the owner of that patent?

A. Yes.

Mr. Boyken: I would like, if your Honor will permit, to introduce the patent in evidence and ask it be marked.

Mr. Lassagne: No objection.

The Court: Mark it Plaintiff's Exhibit 1.

(Patent No. 2,317,064 was thereupon received in evidence [13] and marked Plaintiff's Exhibit No. 1.)

Mr. Boyken: Q. When did you organize the Pacific Oxygen Company?

A. First made application for the name Pacific Oxygen Company in June, 1936, but I didn't get into production and made no deliveries until March of 1937.

Q. Are you the sole owner of that business?

A. Yes. [13a]

Q. What business were you in before you commenced selling oxygen?

A. I used to be in the ice business.

Q. Now, you started in with a very small capital, I understand.

A. Well, it was very small compared to my competitors.

(Testimony of William Josephian.)

Q. But it has increased since, hasn't it, the capital? A. Yes, sir.

Q. What is oxygen used for in commercial operations?

A. Well, it is mostly used for welding and the cutting of steel, especially in steel fabrication shops, where steel is processed, they use oxygen in the work.

Q. Could you develop that a little further? In what way do they use the oxygen?

A. Well, whenever they want to cut a piece of steel they merely light a torch and they apply the heat of the flame and then a stream of oxygen after the metal is heated. It has a tendency to burn the oxygen right through, and you can cut through, say, a half inch or a three-quarter inch piece of steel several feet per minute, and it is really a very handy tool so far as steel fabrication is concerned.

Q. With respect to welding, how is it used?

A. In welding operations it is used with an acetylene torch, which is simply a nozzle where the oxygen and acetylene mixture makes a very hot flame. The temperature of the flame is something over 5500 degrees to 6000 degrees, which melts the steel—it has only a melting point of, say, 2400 degrees, and makes it a [14] homogeneous or one solid mass.

Q. We have in the court a full sized set of oxygen tanks. How much do these tanks weigh? Let us take the individual oxygen tank, how much does that weigh?

(Testimony of William Josephian.)

A. One individual tank—they have several different alloys of steel. The very lightest tank you can buy of that size is about 110 pounds, and then the heaviest you can buy is about 130 pounds empty. It usually takes 18 to 20 pounds of oxygen to fill a cylinder.

Q. Just take these oxygen tanks that have been exhibited in the courtroom which are yours. How much do those individual tanks weight empty?

A. Empty they will weigh 120 pounds each.

Q. And these happen to be empty?

A. Yes.

Q. And so taking a unit of four of these as they have been shown here in the courtroom together with the fittings, the base and the top fittings, how much does the whole unit weigh here, would you say?

A. It weighs about 520 pounds, and there is about 84 pounds of oxygen in it by weight.

Q. Now, the oxygen is under heavy pressure when it is in the tank?

A. Yes.

Q. What is that pressure?

A. Well, these particular cylinders are filled to 2265 pounds pressure per square inch at 70 degrees Fahrenheit.

Q. That is the reason for having these tanks so heavy, is it not?

A. That's right.

Q. Now, on a typical job where you move oxygen out on a job, [15] how are these tanks arranged?

(Testimony of William Josephian.)

A. Do you mean when they are in units, or when they are individual cylinders?

Q. I have shown the court a photograph—if I may have that—do you happen to know what particular job that was (handing a photograph to the witness).

A. Well, this job is the Bacon Vulcanizer Company.

Q. I didn't get that name.

A. Bacon Vulcanizer Company, in Oakland.

Q. And when was the photograph taken?

A. About a year or so ago. I don't recall exactly.

Q. Is that one of your installations?

A. Yes.

Q. Will you explain how those tanks are arranged as shown in that photograph?

A. Well, these units are manifolded with 8000 cubic feet or eight of those units in one row. There are two rows, which this photograph shows. The customer uses the gas from one side, and when it becomes empty he can shut it off and then use the oxygen from the other side. Our delivery truck in the meantime will come by, pick up the empty units, put in full units, and then he is serviced for the next operation, or until he uses up the other side.

Q. Is that a photograph of one of your typical installations? A. Yes.

Q. And that utilizes the invention in this patent?

A. Yes.

(Testimony of William Josephian.)

Mr. Boyken: I think I might as well at this time introduce in evidence the photograph. [16]

Mr. Lassagne: I will object to that at this time on the ground there is no showing by way of evidence of any correspondence between the units shown in that photograph and the structure covered by the patent. The witness is not an expert who can testify it embodies the invention of the patent, and there has been no testimony at all establishing the correspondence of these painted units which are the type shown in the photograph, with the type covered by the patent.

Mr. Boyken: It is for illustration only. I asked the witness if this was one of his installations and he said yes.

The Court: I think what counsel was objecting to was the added expression you put in, whether or not it embodied the invention.

Mr. Boyken: I will leave that part out of it, then.

Q. I will ask you if this is one of your installations? A. Yes, sir.

Q. And this illustrates your testimony about manifolding these tanks together so that they operate as a unit? A. Yes.

Mr. Boyken: I then offer it in evidence as Plaintiff's Exhibit 2.

Mr. Lassagne: There is no objection to it as illustrating that testimony.

(The photograph was marked Plaintiff's Exhibit 2 in evidence.)

(Testimony of William Josephian.)

Mr. Boyken: Q. Now, on the job which is the one shown [17] in that photograph, Plaintiff's Exhibit 2, how are the oxygen tanks moved out to the job from your plant?

A. Well, they are moved out on a truck.

Q. First you make the oxygen right there at your plant? A. That is right.

Q. Then what do you do next?

A. Well, they are charged into units, and after they are charged into units they are carried out to the jobs and hooked on the manifold, and the customer uses it for a manifold. That prevents the necessity of a customer using any cylinders or in any way bothering himself with moving tanks through his premises.

Q. I want to follow in detail how this oxygen is moved out from your plant to the job. First you make the oxygen and then you put the oxygen in these tanks? A. Yes.

Q. Into these units, such as the one that is here in the courtroom, where there are four tanks?

A. Yes.

Q. Fastened together in this form?

A. Yes.

Q. And then these units are put on trucks at your plant? A. Yes.

Q. And then they are moved out to the place where they are to be used, the job, is that right?

A. That is right.

Q. Tell us what is done when they get out there

(Testimony of William Josephian.)

to the job? What is the first thing? You take them off the truck, don't you?

A. Take them off the truck, bring them up to the manifold. [18]

Q. You bring them up to the place where they are to be used? A. Yes.

Q. Such as the spot shown on this photograph?

A. Yes.

Q. Then what is done?

A. Then the cylinder—the unit it seems as though is never exactly in line, so you have to rotate it, move it around, either one way or the other, so the connection can be made to a copper pigtail, and if you were not able to move the unit, then you would have to bend the pipe back and forth, and in a short time you would have broken your copper tubing.

Q. How many men do you have out there at the job to move these units? A. One man.

Q. Take this unit that is before you, which is too large to put in evidence, but that comes to the job. Now, one man handles that? A. Yes.

Q. What does he do with it? How does he handle it?

A. Well, he wheels it over and hooks it up to the manifold.

Q. What difficulty is there in doing that?

A. The unit is so designed that he can move it around, but it has a stable position so he can't pull it over or it can't get out of control. You see, this apparatus is quite heavy, and once it starts falling,

(Testimony of William Josephian.)

the weight increases and will surely drag a person to the ground and is liable to hurt someone.

Q. Can you illustrate that by coming down here and moving this very slight, because we are in a courtroom, here, but just show [19] that motion. Just do it to a small degree.

A. Now, if I want to move it over this way (indicating), or if I want to move it back (indicating)—but suppose I get this over and then all of a sudden it started coming over. Well, you see, I would have to pull it. It won't come over until I get to that position to pull it over. If that was on the very edge it started over, then it would be probably like this and then—you see, quite a bit of pressure comes down. Unless a man were up against it he is liable to get ruptured or get himself hurt.

Q. What enables you to move that around in the way you did without having it upset? I think you can resume your seat, Mr. Josephian.

A. It is the circular track on the bottom plate in relation to the bottom plate.

Q. Did you make these two little wooden models that I have exhibited to the court?

A. Well, I ordered them made at our shop by the man in the back. I can't say I actually did the work.

Q. They were made in your shop under your direction? A. Yes.

Q. The one that I hold in my hand, does that illustrate your device?

(Testimony of William Josephian.)

A. That is a small model.

Q. Of what you just handled in the courtroom?

A. Yes, sir.

Q. Will you take this model and show the court just what happens when you move that big device, and what enables you to move it without upsetting?

A. You see, this—— [20]

The Court: You will have to speak so the reporter can hear it.

The Witness: This circular track, the diameter of it is made in relation to the outer plate, so that the weight balance—it doesn't take much pressure to move it and pull it in such a position that it can be moved around. The idea is so that one man can move it around without a lot of work. But the main thing we have to worry about is the safety angle, because should this thing go out of control and come over too far, then it would come on down, and unless a man were there to catch it, he would hurt himself, so it is provided with a second stable position where it comes over so far and then you have to pull it a little farther in order to get it out of balance.

Mr. Boyken: Q. In other words, for the purpose of the record, in order to move that you first tilt it, somewhat, do you not? A. Yes.

Q. And then in that tilted position you can turn it easily—I mean its maneuverability, is that right?

A. Yes.

Q. What prevents it from actually turning over

(Testimony of William Josephian.)

then? Is there an extra force that is necessary to actually turn it over, to upset it?

A. Yes, the practice is to make that base relative to the bottom plate so that there is a second stable position, so that it can't come over unless you put additional force on it.

Q. So in the ordinary moving of that there is no danger of [21] upsetting, is that the point?

A. That is right.

The Court: We will take the morning recess at this time.

(Recess.)

Mr. Boyken: Q. You spoke of moving these units into position. Now, you could also move the individual tanks into position, could you not?

A. Yes, you could.

Q. What is the advantage in the form that you have here in court over the moving of individual tanks?

A. Well, you handle all four cylinders just like you would handle one cylinder, so it gives you 300 per cent more advantage.

Q. What about the base and the track in your invention as against the single cylinders? How are these single cylinders, if you took them out of this cluster here—what does the bottom look like of the single cylinder?

A. The bottom is slightly rounded. They are slightly smaller in diameter in a single cylinder because in handling the cylinder it is not practical to have sharp lines. It comes at a slightly smaller

(Testimony of William Josephian.)

angle. The cylinder can be tipped over, but there is so little difference in weight it doesn't make any difference. A man can hold it up no matter what position it is in. It is only 130 or 140 pounds, and even if it is lying down you can easily pick it up.

Q. So as a practical man what are the advantages in your invention as compare to handling single cylinders?

A. Well, you can handle four cylinders for the work of one cylinder. [22]

Q. What else? How about spotting the cylinders?

A. Spotting of the cylinders is no easier with that unit than it is with an individual cylinder. After all, you can move an individual cylinder very easily.

Q. It is largely a matter of saving time?

A. That is right.

Q. And it enables you to position four cylinders at a time in its proper place? A. Yes.

Q. Now, the photograph showed quite an installation. Do you also sell to small shops?

A. Yes. These units are used in operations where a customer may use from three of these a month, ten a month, up to a thousand a month. We had one customer who used a thousand of these units of oxygen a month.

Q. When you talk about a unit you mean four cylinders together? A. Yes.

Q. In the form that is here in the courtroom?

A. Yes, sir.

(Testimony of William Josephian.)

Q. How many of those units does your company own at the present time? A. 500.

Q. While I am on the subject, formerly, I understand, you did not put the patent number on there, but you have recently put it on?

A. Yes.

Q. When did you stop?

A. The early part of last year.

Q. Now, why couldn't you take a cluster of four cylinders like that and put it on some kind of a truck and wheel it into position? What is the advantage of your invention over the [23] truck form?

A. Well, you can do that, but after you get there it may not be exactly in right. Then you would have to move your hand truck out again and make another run at it. And then it may be off another inch or so. So you would be constantly losing time trying to spot your cylinders.

Q. And using it in the form that you have is a faster way, I take it? A. Yes.

Q. I would like to go back now, Mr. Josephian, as to the reasons which caused you to make this invention. You say you commenced in the oxygen business about 1937; that is correct, is it?

A. Yes, sir.

Q. And when you first commenced in the oxygen business how did you deliver your oxygen?

A. Well, almost all the oxygen was sold in cylinders, that is, free cylinders. Everything was

(Testimony of William Josephian.)

dumped in our plant in individual cylinders, and we handled individual cylinders in the delivery of it.

Q. Cylinders like those in court?

A. One at a time.

Q. One at a time. How long a period of time did you sell oxygen in individual cylinders in that form?

A. About four years.

Q. And then what happened?

A. Well, the Linde Air Products Company——

Q. What is that name, again?

A. Linde Air Products.

Q. Linde Air Products?

A. Yes, sir, a unit of the Union Carbide Company, came out with a bulk oxygen delivery system. [24] They would manifold at the customer's place of business a number of cylinders or tubes, which would receive oxygen, then they would start out from their plant with liquid oxygen, which is at a very cold temperature. At 300 degrees below zero oxygen will run like water. It is in liquid form. They would drive their truck out to the customer's premises with liquid oxygen, that is, refrigerator cold, and then from that cold liquid they would compress it into the manifold system of the customer under high pressure, and in that way the customer wouldn't have to handle any cylinders in their yard. The yard was completely piped, and it offered quite an inducement to the type of account we were serving.

Q. Let me go over that step by step. You say

(Testimony of William Josephian.)

this other company made oxygen and delivered it in liquid form, is that right?

A. Well, they didn't deliver it. They went to the customer's premises with it in liquid form, and then they compressed it to a gas form, but they actually sold gas to the customer in gas form.

Q. It was delivered to the customer then changed into a gas form at the customer's plant, is that right?

A. Yes.

Q. And delivery took place in large trucks?

A. Yes.

Q. Something like oil trucks, or gasoline trucks?

A. Well, no.

Q. Special?

A. They didn't hold that big volume of oxygen; much smaller volume.

Q. Was it a specially-equipped truck?

A. Yes. [25]

Q. And what special equipment was there on these trucks?

A. Well, the liquid tank would have to be able to carry liquid oxygen, which is 300 degrees below zero, approximately, and it would have to be very heavily insulated or be a vacuum type of container.

Q. That would be a special truck?

A. Yes.

Q. And then it was made into a gas at the customer's plant?

A. Yes.

Q. Was that a cheap way of doing it?

A. Well, it was, yes. It was a cheap way, and not only that, it is the same as the units. He did

(Testimony of William Josephian.)

not have to handle cylinders, and a customer did not have to bother about keeping them on his manifold or anything else. All he did was use the gas.

Q. It was a new way of doing it? A. Yes.

Q. What year was that?

A. 1940 and 1941.

Q. About 1940, 1941? A. Yes.

Q. That was rather severe competition as far as you were concerned, was it not?

A. Yes, sir.

Q. What did you do to try to meet that competition?

A. Well, I can say that I got a lot of gray hair over it.

Q. Aside from the gray hairs, and in a more practical way, what did you do?

A. First I investigated the possibility of converting some of our equipment over to liquid production, which was not the practical thing to do in a small plant such as I own. Then I investigated the various other gas delivery [26] systems. Mr. Moody, in Los Angeles, had a cluster ten cylinders on a platform which he moved around with a lift truck.

Q. With a lift truck? A. Yes.

Q. That is, he got under the thing with a lift truck, lifted it up, and then moved it around on wheels? A. Yes.

Q. What was the matter with that?

A. There was nothing very wrong with it, except we had to deliver oxygen in competition and very,

(Testimony of Wiliam Josephian.)

very cheaply, and we could not afford to have a man going around trying to spot a group of ten cylinders. We had to get our deliveries in, get it out, and get it going before too much time elapsed. I didn't think that was very practical.

Q. What other means did you consider of delivering oxygen except by the individual tank method you had been using up to that time?

A. We used manifolded trucks or trailers, which I believe the Stuart Oxygen Co. at that time had a manifold trailer, or several of them, but there were others that were manifolding trailers at that time.

Q. What was the matter with that, so far as you were concerned?

A. It took a lot of equipment and it did not get down to the small user, and it did not take care of the fluctuations. Once you converted a man to both oxygen delivery and his business slowed down, you couldn't take the apparatus out. You still had a truck tied up.

Q. So what did you do about it?

A. I didn't think that was [27] so good. The Air Reduction Company had tube trailers. That was completely out of my means. So for several months I would think all the time, and I guess—I don't know—I would go to a show and wouldn't see it, go out, and wouldn't know what I was doing. Finally I hit upon the idea of balancing the cylinders on a plate, as you see here.

Q. When did you first make a model, full-sized

(Testimony of Wiliam Josephian.)

model in conformity with the invention described in the patent here in suit?

A. In about December, 1941.

Q. And over at your plant in Oakland?

A. Yes.

Q. How many cylinders were in the model?

A. Well, the first model I made was seven cylinders.

Q. Was this a full-sized model? A. Yes.

Q. And right after that——

A. Of course, seven cylinders are all right for myself. I can move that all right. But it was a little too heavy for the average man to move around. There was no trouble so far as getting the rotating motion or spotting it is concerned, but where you had to carry it a long distance or up any grade, it was just too much weight.

Q. Seven cylinders? A. Yes.

Q. So when did you make a second model?

A. Well, in the same month.

Q. About the same month? A. Yes.

Q. And the second model had how many cylinders? A. Four cylinders.

Q. In other words, the second model is similar to the device [28] we have in the courtroom?

A. Yes.

Q. And the first one with the seven cylinders is like the drawing of the patent? A. Yes.

Q. Do you remember the name of the man who assisted you in making these two full-sized models?

(Testimony of Wiliam Josephian.)

A. Well, it was a mechanic, a fellow by the name of Paul McNish.

Q. And did you try them out at that time to see if they would work?

A. Yes. We tried them out a number of times, moved them back and forth, rotated them, did everything that we could think of.

Q. I am going to show you some photographs, and I ask you if these are the photographs of the two models that you made.

A. Yes, these are the models, and I know this was the first one made, because I didn't have the half-inch bar which I have under the bottom plate on this job. It was the very first one.

Q. You mean the four cylinder one was the first one? A. Yes.

Q. And then the seven-cylinder? A. Yes.

Q. Are these photographs of the four-cylinder and the seven-cylinder models? A. Yes.

Q. Do you remember when these photographs were taken?

A. They were taken sometime in December or the early part of January.

Q. Of what year? A. 1940 or 1942.

Q. December of 1941 or January of 1942?

A. Yes.

Q. At your plant?

A. Yes. That is the back door of the plant. [29]

Mr. Boyken: I am going to offer these photographs in evidence and ask that they be marked Plaintiff's Exhibits 3-A, B, C, D and E.

(Testimony of William Josephian.)

The Court: Very well.

Mr. Boyken: I will show them to your Honor in a moment.

(The photographs were marked respectively, Plaintiff's Exhibits 3-A, B, C, D, and E, in evidence.)

Mr. Boyken: Q. Now, I understood you to say you tried them out and they worked, is that correct?

A. Yes.

Q. At approximately the date that you have given? A. Yes.

Q. Now, you spoke of this competition of liquid oxygen as being rather severe. Did you personally lose any accounts because of that cheap competition?

A. Yes. One of our largest accounts, which was the Woolridge Manufacturing Company at Sunnyvale, we lost that to liquid competition.

Q. After you made this invention and made these two models what did you do? You were commercializing your invention?

A. Well, immediately we installed our other—we had the Vulcan Steel Foundry, which was already manifold, so we asked permission if we could install the bulk oxygen system in there, and so we worked it out and they granted us permission and we started putting it into operation in February, 1942.

Q. From then on you increased your units until at the present time you have some 500?

A. Yes, sir.

(Testimony of Wiliam Josephian.)

Q. Did that enable you to meet the competition that you were [30] somewhat afraid of?

A. Yes.

Q. I mean the invention that you had made?

A. You see, in liquid delivery, after the liquid truck went out to a customer's place, he could only deliver from ten to twelve thousand cubic feet an hour, so it was up to us to find a method of being able to have the driver go out there and deliver it faster per hour. We timed how fast a driver could deliver with our set up, and we could average with a smaller setup—when I say “small” I mean six to eight units—at the rate of 30,000 feet per hour, and in the larger setups at the rate of 60,000 feet an hour, but since that time the liquid products have increased their delivery capacity to around twenty-five or thirty thousand cubic feet an hour.

Q. Then after you made these two models you had a patent application prepared and filed, is that right?

A. Yes.

Q. Your application date of the patent in suit is January 14, 1942, so I take it that was just shortly after these two models were completed?

A. Yes.

Q. And this application shows a drawing of seven of those cylinders. How did you happen to choose the model that had the seven instead of the four for illustrating your invention?

A. Well, the seven cylinders had more weight and for that reason would be more effective in demonstrating how the balance could be achieved.

(Testimony of William Josephian.)

Q. According to those photographs, the rolling ring was apparently [31] made of a separate pipe, is that right? How did you make those models, the two that are shown in the photographs.

A. Well, the rolling rings on both of them were made of pipe, but on the seven-cylinder unit I used a two-inch pipe, and on the four-cylinder unit I only used a one-inch pipe. But that is a relative matter. That is, the pipe has to be relative to the base plate to give you the proper balance, whatever balance you want in your operations.

Q. Are you acquainted with anybody connected with the defendant here, the Stuart Oxygen Company, Ltd.?

A. Well, I am more or less acquainted with all of them except their present attorneys.

Q. They are competitors of yours, I take it?

A. Yes.

Q. Do you remember attending a convention in Detroit, Michigan, about June of 1942?

A. 1943.

Q. 1943? A. Yes, sir.

Q. What kind of convention was that?

A. Well, that was a convention of the Independent Oxygen Manufacturers' Association. We were trying to get a small association started to exchange ideas.

Q. You were present at that convention?

A. Yes.

Q. In Detroit? A. Yes.

Q. Any other man in your employ there?

(Testimony of William Josephian.)

A. Mr. Kohl, my sales manager was there, and an engineer from our plant, Mr. Callow, was there.

Q. Any body from the Stuart Oxygen Company?

A. Mr. D. J. Will, [32] of the Stuart Oxygen Company was there.

Q. You say that was in June, 1943?

A. Yes.

Q. Up to that time, as far as you know, what means did the Stuart Oxygen Company have of delivering its oxygen to the job?

A. Well, they had—they used mostly free cylinders, that is, individual cylinders. They had some manifolded trucks, and I don't know whether they had any manifolded trailers, but I do know they had manifolded trucks and delivered oxygen to the customers.

Q. Was there any discussion at that convention as to your invention? A. Yes.

Q. With whom?

A. Well, with Mr. Will, and with several of the independent oxygen manufacturers.

Q. I am only interested now in discussions that you or your employees may have had with Mr. Will.

A. Well, we talked about bulk oxygen delivery, and I showed him pictures of what we had, and just how good it was.

Q. Did you show him any pictures of your invention? A. Yes.

Q. What pictures were they?

(Testimony of William Josephian.)

A. Well, they were small pictures.

Q. Do you have those pictures now?

A. Yes, I think I gave them to you.

Q. Were they pictures similar to those that are in evidence, except smaller in size?

A. No, those pictures are made by a professional photographer, but these pictures were made by Mr. Callow. [33]

Q. Was there any discussion with Mr. Will as to how the device was constructed and how it operated?

Mr. Lassagne: If your please, your Honor, I do not see the relevancy of this examination. The patent became a publication in 1943. There is no charge that Stuart used anything approximately like it prior to the issuance of the patent, and the patent can be seen by the whole world at this time. There is no relevancy at all as to the examination prior to its communication between the parties at this stage.

Mr. Boyken: There is a special defense of want of notice, and I am developing that defense. I mean I am developing our side of it. It may be anticipatory.

Mr. Lassagne: The defense of want of notice goes only to the accounting procedure, which can only follow an interlocutory decree in the case. It seems to me to be unduly extending the case. I have no objection on the ground that it is prejudicial, but it is totally irrelevant at this stage of the case.

(Testimony of William Josephian.)

The Court: I do not suppose it would be very lengthy.

Mr. Boyken: No.

The Court: I will allow it.

Mr. Boyken: Q. At any rate, at that convention you told them what your invention was and how it worked, is that right?

A. How it worked, and the fact that it was patented.

Q. You told them that it was patented?

A. Yes.

Q. Did you show them a copy of the patent then? A. No, I did not. [34]

Q. Did they say anything to you about whether or not they were using anything of the kind?

A. No.

Q. Now, did you have any further conversations with anybody connected with the defendant regarding your patent after that Detroit convention in June of 1943?

A. Well, in 1944 there was another convention in Denver, and at that time there were three men from the Stuart Oxygen Company, as well as Mr. Will and Mr. Coyne, and we covered the bulk oxygen delivery, Linde Liquid's setup, our setup, and I also at that time told them it was patented and was well covered.

Q. What was the next time they had notice of your patent?

A. I think early in 1945 Mr. Brassler wrote him a letter.

(Testimony of William Josephian.)

Q. He was your attorney at that time?

A. Yes.

Q. And that was a patent notice?

A. Yes.

Q. Were there any men from the Stuart Oxygen Company over at your plant, say, in recent years?

A. Well, yes, after we came back from Denver there were two or three Stuart Oxygen men came through our plant just to see the operation. We got it pretty clean and pretty neat, and they gave us the reason they would like to see how things were being kept up, so I invited them over.

Q. Did you show them the device of your patent in suit?

A. Yes, and I also showed it to Mr. Will, took him out to the various jobs and showed him how they were hooked up to the lines, how they were connected and all about it. [35]

Q. In what year did that occur?

A. In 1944, the latter part.

Q. When did these men come over and look at your plant? A. In 1944.

Q. When did you first hear that the Stuart Oxygen Company was making and using something similar to your invention?

A. The early part of 1945.

Q. How did that come to your attention?

A. Well, I used to have a man working for me by the name of Jack Molinari.

Q. Will you undertake to spell that?

A. M-o-l-i-n-a-r-i.

(Testimony of William Josephian.)

Q. What was he, a mechanic?

A. He was a mechanic in our shop. And he said he wanted to take a month or two off. I said, "Well, I can't afford to let you go, but all right." He went. I waited a month and asked him to come back. And he didn't show up. And after about six weeks I decided that maybe he wasn't coming back, so I hired another man. Then from time to time our truck driver, who was very friendly with Mr. Molinari, used to call on him, and our sales department would call on him to find out how he was getting along, and he was building some apparatus for Stuart Oxygen Company. And later on I heard that he was building this unit for Stuart Oxygen Company. In fact, one of our men saw the model in his shop?

Q. When was that?

A. I think that was sometime in 1945.

Q. Was that the first you heard of the Stuart Oxygen Company using something similar to what you were doing? [36]

A. They were not using anything at that time. They were just making it, and we were talking to a customer trying to get the business on bulk oxygen delivery, and the Stuart people at that time said they had something similar to ours, that they would be able to do anything we could do.

Q. When did you first see a commercial installation by the Stuart Oxygen Company of the device that is here in question? A. In 1946.

(Testimony of William Josephian.)

Q. Have you made a model of the Stuart Oxygen Company device?

A. Well, we had it ordered made.

Q. That, again, was made under your direction in your shop? A. Yes. [37]

Q. Was there also a drawing made of the defendant's device? A. Yes.

Q. Is this the drawing?

A. That is the drawing that was made.

Q. Is this the model that you made?

A. Yes.

Q. I wish you would explain to the Court by referring to the model and perhaps also to the drawing just how that Stuart Oxygen Company's device operates.

The Court: I believe there was a model——

Mr. Boyken: I was going to put them both in evidence at the same time, but I can do that. We offer in evidence the model of the plaintiff's device and ask that it be marked Plaintiff's Exhibit 4, and the model of the Defendant's device as Plaintiff's Exhibit 5.

Mr. Lassagne: I have no objection to Plaintiff's Exhibit 4. I do object to Plaintiff's Exhibit 5 because it has not been established by proper testimony that it corresponds dimensionally or according to scale with anything that the defendant has manufactured.

Mr. Boyken: Your Honor, I don't contend it is the defendant's device. It is a representative model only. I hope to put in either the defendant's de-

(Testimony of William Josephian.)

vice or a photograph, so there will be no question about that.

The Court: Plaintiff's Exhibit 5 is offered for illustration? [38]

Mr. Boyken: Well, both of them are for that purpose. I am going to ask in a moment what the scale is.

The Court: You may proceed.

(The models of Plaintiff's device and of Defendant's device were marked, respectively, Plaintiff's Exhibits 4 and 5 in evidence.)

Mr. Boyken: Q. How were these models made, Plaintiff's Exhibits 4 and 5, what scale was used?

A. We used 2 inches to 1 foot.

Q. I take it you made them just as well as you could for illustrative purposes?

A. Yes; we tried to balance the cylinders as far as weight is concerned comparable to the weight of an oxygen cylinder, and physical dimensions and weight of an oxygen cylinder and everything about it. We tried to do a workmanlike job to make a true model.

Q. Now, in what respects, if any, do these devices differ?

A. Well, the way they are—the cylinders are held together, which is very obvious.

Q. That is, in your device you have what means of holding the cylinders together? I am referring to Plaintiff's Exhibit 4 as your device?

A. Well, in my device, the cylinders are held together with the top and bottom plate being bound

(Testimony of William Josephian.)

by bolts which go from the bottom plate to the top plate and they are tied down or held still in place. In the defendant's device they hold it from the side; in other words, this strap [39] to a center member.

Q. You have a full plate at the top?

A. Yes.

Q. The defendant has a plate? A. Yes.

Q. They have both bases? A. Yes.

Q. Have they both tracks at the bottom of the base? A. Yes.

Q. In your case the track is attached to the base in what way?

A. Well, it is welded on, it is a part of it.

Q. In the defendant device what, if any, difference is there?

A. It is dropped out of one piece of metal, but it has the same effect as being welded.

Q. The defendant may be operated in the same way? A. Yes.

Q. There was a slight difference in the balance of these? A. Yes.

Q. What difference is that?

A. Well, apparently they have not allowed quite as much clearance on the bottom of their unit compared to ours so you can pull it over like this and it will come back.

Q. The tendency is to straighten itself?

A. Yes.

Q. Does that make any difference in the maneuverability of these two units? A. No.

Q. They move just the same? A. Yes.

(Testimony of William Josephian.)

Q. On the track? A. Yes.

Q. As far as the tipping over or the upsetting, would that make any difference?

A. No. It has also a second stable position where it won't fall over unless you exert a great deal [40] of pressure.

Q. I take it that Figure 3 is the figure corresponding to Figure 3 of your patent. Your device will not remain over unless it is held in that position? A. That's right.

Mr. Lassagne: I suggest the drawing be marked for illustration at this time so we will know what we are talking about.

Mr. Boyken: I intended to put that in evidence. It may be better if I do it now. I offer the drawing referred to by opposing counsel in evidence and ask it be marked Plaintiff's Exhibit 6.

Mr. Lassagne: I object to the drawing on the ground there is no evidence that it corresponds dimensionally or otherwise with anything the defendant manufactures.

The Court: Ask him where he made it, or how he made it.

Mr. Boyken: Q. How did that drawing happen to be made?

A. I think we took physical dimensions of a Stuart Oxygen Company tank.

Q. Where did you see the unit of the Stuart Oxygen Company?

A. At a customer's plant.

Q. Was this drawing made as a result of that?

(Testimony of William Josephian.)

A. Yes.

Q. You did not make the drawing yourself?

A. No.

Mr. Boyken: I will offer it in evidence as Plaintiff's Exhibit 6.

Mr. Lassagne: I object to that. The witness did not take the measurements himself. He thinks they were taken. He [41] did not make the drawing himself. He has no firsthand knowledge of the authenticity of that drawing or if it corresponds with defendant's device.

Mr. Boyken: I expect to put the defendant's device in evidence, or a photograph of it, so there is no question about that.

Mr. Lassagne: The fact is it does not correspond and we will show that in our case. I think it is important. I object to a drawing of the defendant's device like that.

The Court: Wouldn't it go to the weight of the evidence of the witness? He says it is a correct drawing of the defendant's device. If it is not that can be brought out. I don't know whether that would go to the question of its admissibility at this time. Then the question would later arise as to how much weight the Court should give that in evidence.

Mr. Lassagne: Very well. If it is done only to illustrate his testimony——

The Court: The witness said the drawing was made under his direction, that it was a correct draw-

(Testimony of William Josephian.)

ing. That would make it admissible. You then, of course, could develop whether it is correct.

Mr. Lassagne: I wanted to avoid the impression that there was any testimony connecting it directly with the defendant's device except by hearsay.

The Court: What we have said is in the record and I [42] think that will take care of that matter. Let it be marked.

(The drawing of defendant's device was marked Plaintiff's Exhibit No. 6.)

Mr. Boyken: That brings up the point that we want to have clearly in evidence in this case what we consider as an infringement and it is impracticable to put in evidence those four tanks of yours and the base and so on, but it is on exhibit here and I would like to put that in evidence with permission to withdraw it and substitute a photograph.

The Court: All right.

Mr. Lassagne: We will give you two options. You may put in evidence the device with the four tanks on it, which is a rather bulky and heavy thing to handle, or you can put in evidence the holder itself without any tanks in it, which is more easily handled.

Mr. Boyken: As long as we have a setup here with the four tanks and the so-called holder of tanks, I think I would like to put in evidence the four tanks and the holder of the defendant and have it considered in evidence and with permission to withdraw it and substitute a photograph because

(Testimony of William Josephian.)

it is impracticable to have a big thing like that in evidence.

The Court: Does that belong to the defendant?

Mr. Boyken: That one does. I want to do the same thing with this.

The Court: What? [43]

Mr. Boyken: I want to do the same thing with the plaintiff's.

The Court: There is no question but what that is the defendant?

Mr. Lassagne: We will stipulate the green device here in court is the defendant's, the device manufactured and used by the defendant.

The Court: You could substitute a photograph later on.

Mr. Boyken: I offer the defendant's device, which is the accused device, and ask that it be marked Plaintiff's Exhibit 7, and I also offer in evidence the device made in accordance with the patent by the plaintiff and ask that that be marked Plaintiff's Exhibit No. 8.

The Court: Very well.

(The defendant's and the plaintiff's devices were thereupon received in evidence and marked, respectively, Plaintiff's Exhibits 7 and 8.)

Mr. Boyken: Then if we choose I presume we can substitute photographs.

The Court: Yes. I don't know what I will do with these things later on. You'd better substitute photographs.

(Testimony of Wiliam Josephian.)

Mr. Boyken: I think that will be the best, perhaps to substitute photographs for these. I have no further questions. You may cross-examine.

Cross Examination

Mr. Lassagne: Q. When you applied for your patent in suit, [44] Mr. Josephian, were you of the opinion that you were the first one to invent a portable gas cylinder holder in which a plurality of cylinders were connected together so they may be filled, delivered and emptied as one cylinder?

A. No, because I already knew that others were manufacturing cylinders and they were portable. They got under them with a hand truck to move them around.

Q. You were not of the opinion then that you were the first one to invent a gas cylinder holder making it possible for one man to move several cylinder tanks?

A. No. In fact, I didn't give it a thought as being a first or any other way.

Q. Your patent states a number of objects of your invention and as I read this particular passage I would like you to consider it with the purpose of telling me whether or not you regard yourself as the first to accomplish these objects. Beginning at Page 1, Column 1, Line 5, you say:

"Among the objects of my invention are: to provide a simple and efficient truck for handling a plurality of cylinders; to provide a means for easily handling a plurality of heavy cylinders containing

(Testimony of William Josephian.)

a usable gas; to provide a means for assembling a plurality of cylinders into an easily movable unit, and to provide a simple and efficient truck for handling gas cylinders, such as oxygen, hydrogen, acetylene, carbon dioxide tanks, or the like". Did you consider that you were the first to accomplish [45] any or all of those objects?

A. About providing an easy and efficient means, yes, I feel that I was the first to accomplish that effect, but as far as accomplishing portability is concerned, no. As I said before, there were others that had manifolded cylinders.

Q. You mean yours was comparatively more easy and comparatively more efficient than previous things——

A. Yes.

Q. You testified it had been customary for a long time prior to your invention to move individual cylinders by tipping them up and rolling them on an edge, is that right?

A. Yes.

Q. That lower edge of an individual cylinder is rounded and has a bottom conformation very much like the circle of your Track 11 in your patent?

A. It has, but it is at the edge so that if you tip it over to a certain point, it will fall clear over, it has no second stable position there.

Q. That is because there is nothing attached to it there in your cylinder corresponding to the bottom plate——

A. No, that has nothing to do with it. It is a matter of relation of the inner track and the outer track.

(Testimony of Wiliam Josephian.)

Q. Isn't it the contact of the edge of the plate with the floor that keeps it from tipping clear over? A. Yes.

Q. When you move a single cylinder by tipping it and rolling it on the lower edge of the track it is slightly balanced on the edge on which you roll it as near as possible to make it [46] easy to roll?

A. Yes, but you never really balance it equally, you always have a little pressure. It is almost physically impossible to get it exactly in balance.

Q. Well, that is a mathematical point which you never see or achieve, but you can get close to it by the push outward or pull inward where it is at a minimum? A. Yes.

Q. You can get either one in a position which would be the balancing position? A. Yes.

Q. With a device of your patent it is even more important to get as close to that balance point in rolling it on the Track 11, isn't it, because of the great weight involved? A. Yes.

Q. Your device is so constructed that you can move over to both sides of its point of balance on Track 11, is it not?

A. Yes, but it doesn't have to be that way. It is merely—that is one way of doing it.

Q. I am talking about what you disclosed in your patent, not what you thought of since. Is there any other way disclosed in your patent?

Mr. Boyken: I object to that. The patent speaks for itself. It is a broad, generic patent, and the description is there.

(Testimony of William Josephian.)

Mr. Lassagne: Will you stipulate it is not disclosed in the patent?

Mr. Boyken: I say the patent only covers your device.

The Court: I will allow the question. Would you like to [47] have the question read?

The Witness: Yes.

(Question read.)

Mr. Lassagne: Is there any other way disclosed in your patent?

A. Well, I think the patent states in the literature that it can be done many ways and you can get any desirable balance you want. It doesn't say it has to be over the center of gravity.

The Court: We will take a recess until two o'clock in this matter.

(A recess was thereupon taken until 2:00 o'clock p.m.)

Afternoon Session, April 30, 1946, 2:00 p.m.

WILLIAM JOSEPHIAN,
recalled.

Cross Examination (resumed)

Mr. Lassagne: Q. Mr. Josephian, just before the noon recess we were discussing the matter of bringing the unit to a balanced position for rolling so that the tendency of the unit to pull away from you or to push toward you during the rolling operation would be minimized, and I understood you

(Testimony of Wiliam Josephian.)

to say that according to the disclosure of your patent it was not stated to be necessary that the unit be so constructed as to be capable of being moved to that balanced position, is that correct?

A. Well, I thought the patent said that it could be placed in any kind of a balanced position. That depends on the person building the unit, and how they wanted to operate. Now, if you wanted to get exactly in a balanced position you could make your tracks relative to one another so that they would be exactly balanced, or if you wanted to go back, you could make your track a little bit larger and it will go back, or if you wanted to go outside the inner ring, you can reduce the diameter and it will go the other way. But in all of it, it allows protection to the operator in that it does not overturn. That is the principal thing we are trying to do.

Q. Mr. Josephian, here is a printed copy of your patent involved in this suit. Can you find me any place in the printed specification [49] of that patent where it says that the unit need not be so constructed as to be capable of being moved to a balanced position, that is, the position in which it has a minimum tendency either to pull toward you or tip away from you?

A. What is it you want to know? In line 45.

Q. What page and column?

A. Page 2. That is in paragraph 45. It says, "I wish it to be distinctly understood that the drawing given herewith is illustrative only, and that the relative diameters of track 11 and lower plate 8

(Testimony of William Josephian.)

may be varied as desired to control the amount of force necessary."

Q. Necessary for what? Read the rest of the sentence.

A. "to tilt the unit into the tilted stable position where the center of gravity thereof is between contacts 17 and 20."

Q. Doesn't that mean beyond balanced position outwardly?

A. Yes, but then I also mention that it is not the only way to do it, that that is an example, that is an advantageous way of doing it, especially our original model of seven cylinders, but when the units become smaller and we have less weight to handle it is not so important to have the balance line right on the center track.

Now, a single oxygen unit has only one balanced position. It is either on the very line or it falls over completely. You know that and I know that. Yet, it is no harm to anybody. Anybody can roll an oxygen cylinder around and have no trouble because it is not very important. [50] Only when you get into extremely heavy weight does it become important. With four-cylinder units it is not so important either. It is nearly balanced. It does not say that it has to be on the line. But what we are trying to do with the unit and with this system is to be able to maneuver it into position to make hookups. That is all we are trying to achieve, and so it does not upset.

Q. Now, I have this 4-cylinder unit of yours,

(Testimony of Wiliam Josephian.)

which is plaintiff's exhibit 8, in what corresponds to the tilted stable position illustrated in Fig. 3 of your patent drawing. Now, isn't that the tilted stable position referred to in the last part of the paragraph you just read?

A. It is, I guess. I would take it so.

Q. Then the variation of the relative diameters of track 11 and lower plate 8 is for the purpose of controlling the amount of force necessary to move it to this position, is that correct?

A. Would you state that again?

Mr. Lassagne: Will you read the question, Mr. Reporter?

(Question read.)

A. Well, not necessarily. There is no object in leaving it in a tilted position. We do not sell gas that way. It is merely the amount of force necessary to move it.

Q. I am asking you what the patent says with respect to the variation of the amount of force. It says, "the relative diameters of track 11 and lower plate 8 may be varied as [51] desired to control the amount of force necessary to tilt the unit into the tilted stable position." That is the position in which I now have that unit. Now, I am asking you to find for me any place in that patent where it says that the purpose of varying the relative diameters of the track and the lower plate is to control the amount of force necessary to move it less than that distance to a position where it is unstable?

(Testimony of Wiliam Josephian.)

A. Well, the patent in three or four places mentions the fact that the only reason why the inner track is built is to be able to move the unit in a given direction, and the only reason why the outer plate is built relative to the inner plate is so that it does not overturn. Now, that is the original claims. I didn't write the words in his patent, really. I just do not know what you are trying to achieve. I can't say yes, no, I can't find it, or yes, I can find it.

Q. Well, you read it before you signed your name to it and presumably were satisfied that it described your invention, weren't you?

A. Well, I thought the other fellows were able to handle words much better than I do. I know about them and took it for granted.

Q. Incidentally, what do you regard as a stable position as the word is used in that patent?

A. I regard stable position with regard to the patent as a place where the unit stops and a greater force has to be applied in order to bring it on over before it falls down. [52]

Q. Don't you understand the term "stable" as describing a position in which it will stay if you take your hands off of it?

A. Not necessarily.

Q. Have you had any formal education in physics, Mr. Josephian?

A. Physics?

Q. Yes.

A. High school education in physics.

(Testimony of Wiliam Josephian.)

Q. When you were inventing this device did you have to figure out what diameter to make the ring 11 so that you could tip your device to a balanced position before the edge of the plate struck the floor?

A. Well, that was really too much work, so I ordered from a pipe bending firm a half dozen rings and made them up and picked out what I thought was the best of different diameters, and we just made them up, assembled them, and saw how they worked, and so far as getting right down and figuring scientifically with all the weight involved, any everything else, no, I can't say that I figured it. You must remember that I am not an engineer by profession.

Q. It is quite all right to do it by trial and error, but all I wanted to know was how you made your selections from the various rings you obtained in that way.

A. Well, then you can say I made it by experience or by practice.

Q. Were any of the rings that you obtained in that way of larger diameter than the one you eventually used? A. Yes.

Q. And when you used a ring of larger diameter than the one that you used did the unit stay in tilted position when you took [53] your hands off of it, or did it go back to a vertical position?

A. Well, if I used a larger diameter ring—now, for instance, if this unit was a little flatter, closer to the floor, it also, even though the diameter is the same thing, I found it would go back, and I

(Testimony of Wiliam Josephian.)

found that in order to be able to use a standard thing like a one-inch pipe, I had to put clips on the bottom. You notice on the bottom a half-inch clip. Otherwise it would come clear over. So we just picked on the best application for our particular business and used it.

Q. You selected the one that would stand in tilted position with your hands off of it?

A. Not necessarily. The idea of the tilted position is merely to show that it does not fall over, that in handling it, if you get it over too far, it does not go out of control. I am very sorry that the darned things stands over there, because it is confusing the issue. Everybody thinks that is the way it has got to stand. We can't use it in that position, we don't sell gas that way, we don't handle it that way, and we don't do anything that way. It is merely the part of it that happens to work out that way.

Q. The fact that it can move that far in the case of the seven-cylinder units, which are very heavy, makes it possible to get the unit tilted to the position where the center of gravity is right over the rolling edge, doesn't it? A. Yes.

Q. That makes it easy to move those very heavy units?

A. Yes. But it could have a much larger diameter and you could still [54] get it over the center of any ring. It doesn't mean that it has to be of a certain size.

Q. No, but it is a matter of the relation of the

(Testimony of William Josephian.)

diameter of the ring to the diameter of the base plate? A. Yes.

Q. Or the thickness of the ring to the diameter of the base plate that controls whether it will stay there or go back? A. Yes.

Q. Does your patent specification tell anywhere how the dimensions of the ring, that is, its diameter and/or its thickness should be related to the diameter of the bottom plate to permit the unit to be tipped far enough to balance on the ring for rolling?

A. Yes, I think it states in it, and shows that as an example or an advantageous way of doing it.

Q. Does it tell what the ratio of the diameter of the ring ought to be to the diameter of the plate, not in absolute dimensions, but in proportion terms?

A. Yes, I think it mentions, assuming the seven-unit job, I think it mentions that the weight should come between the inside and the outside circle.

Q. That is the result to be secured, and not the way to secure that result. I want to know where the patent teaches you how to relate the dimensions of the ring to the dimensions of the plate so that the center of gravity will come to that position.

A. I don't know. I can't answer you, sir.

Q. Now, again, your patent specification emphasizes the desirability of designing your device so that the force required [55] to tip it completely over will be greater than the force required to tilt it initially out of vertical position to rolling position, is that correct?

(Testimony of Wiliam Josephian.)

A. I think the patent says that but actually we do not do that. It is less to tip it clear over than it is to tip it in the first place.

Q. That is true of the four-cylinder unit, Plaintiff's Exhibit 8, isn't it? A. Yes.

Q. After it is in tilted position like this, a smaller pull will tip it completely over than would tilt it originally to the tilted position?

A. Yes, but I feel all it has to do is stop there so it does not fall over, or it does not overturn. So far as the force necessary to bring it completely over, I do not see the point in it, because it does not sell gas.

Q. With reference to this drawing entitled "Defendant's Tank Truck," marked Plaintiff's Exhibit 6, do you know what scale that drawing is drawn to with respect to the defendant's actual unit?

A. I understand it was taken from this drawing.

Q. Referring to your patent drawing?

A. Yes, and sort of made illustrative of whatever is here; that is the size of the cylinders showing the base plate. I do not think those are the dimensions at all.

Q. What did you tell the draftsman to do?

A. Well, Mr. Boyken asked me if it would be a good idea to get a drawing made of the defendant's invention, and I thought it was, and that is all there was to it, and they went and did it. I [56] don't know exactly—I don't remember telling the draftsman what to do.

(Testimony of William Josephian.)

Q. Did you tell him to make it accurately showing the construction of the defendant's unit?

A. I don't remember. I don't remember telling the draftsman anything about it. Mr. Boyken handled that.

Q. Didn't you check the drawing after it was made to determine whether it actually delineates the defendant's unit or not?

A. Well, I checked it in that it looks similar to their unit, but as far as getting the ruler and measuring it for dimensions and everything else, no.

Mr. Boyken: If you have a better drawing of this device you may use that, but, after all, this is merely a drawing of your device and we had to do it under difficulties. If you want to produce a drawing we will substitute it for this one.

Mr. Lassagne: Mr. Boyken, you have had access to our devices from time to time for the purpose of examining them and taking measurements, which was done in my presence. I propose to check this drawing here and now to show that it is not only carelessly made but is off in respects which makes the delineation of the defendant's device appear much more similar to the plaintiff's than it is.

Q. Mr. Josephian, since you have testified that this drawing was made under your supervision and your direction, I wish you would step down and first measure the diameter of the bottom [57] plate shown in Figure 4 of the drawing, Plaintiff's Exhibit 6, and then measure the bottom place of the defendant's unit, which I have here, so that we

(Testimony of William Josephian.)

may determine the scale on which that drawing is made?

A. Didn't I mention that these models were made under my direction? Did I also include drawings made under my direction?

Q. I so understood you?

A. I don't remember where the drawings were made under my direction. I believed it was the models we were referring to at the time. That is what I understood. However, I will measure it off for you, if you want me to.

Q. Well, if you now say the drawing was not made under your direction there is no necessity to have you do that. We can have our own man do it when he comes to testify. But the drawing was admitted in evidence on that understanding. I believe.

A. What I was going to say, the conversation before was, you wanted to know how these units were built and we talked about these particular units here that were——

Q. The models in evidence?

A. The models. They were built according to the scale to the best of our ability. I am quite sure about that, sir. I don't think we were talking about drawings at all. The word "drawing" may have gotten into it from the fact that we had to make a sketch of the model before we got the actual size in the physical fabrication.

The Court: We have the actual device in court and it can [58] be observed by the Court; it is

(Testimony of Wiliam Josephian.)

going to be withdrawn, as I understood, and photographed. Is it of any great moment whether this drawing is not precisely to scale or not?

Mr. Lassagne: It becomes so, your Honor, because in devices of this character relatively small changes in dimension of certain critical parts alter the entire mode of operation of the device as a whole. The importance of it was brought out in some of Mr. Josephian's testimony just a moment ago. If he used a ring on his device which was of less thickness, the device would not stand in a tilted position with your hands off, but would go back to a vertical position. And I will show through our own witnesses when the time comes, since Mr. Josephian denies responsibility for this drawing, that the corresponding vertical dimension of the draw in the lower plate is very much exaggerated in this drawing entitled "Defendant's Tank Truck". Josephian testified that the diameter of the ring member of his patent or the relation of that diameter to the diameter of the bottom plate made a difference whether it stayed in the tilted position with the hands off or not. And I will also show that in this drawing entitled, "Defendant's Tank Truck," the diameter of what they say corresponds to their ring in its relation to the total diameter of the plate is very much exaggerated with respect to the defendant structure. So what they have shown in the drawing probably would function as the plaintiff device does. [59]

The Court: I did not take it that that was in-

(Testimony of William Josephian.)

tended to show that the precise dimensions were claimed as the basis for infringement.

Mr. Lassagne: No, your Honor is quite correct.

The Court: I take it from what the witness says what his invention was, was, first, to have the mobility accomplished by this ring around the bottom and, secondly, an added safety feature so that there would be a point in the movement where the thing would not fall down immediately, and his claim is substantially that is the same thing your client is using, irrespective of the precise dimensions involved. That is what I have gotten from the examination so far.

Mr. Lassagne: Your Honor is correctly characterizing that as this witness' appraisal of his own invention.

The Court: I think perhaps it would serve your own purpose better, although I do not know as much about this case as you do—very little about it, so far—perhaps you can better develop that through your own witnesses because Mr. Josephian says he did not draw this.

Mr. Lassagne: Yes, he now says it was not drawn under his supervision and therefore I propose not to ask him to do this measuring job at this time. Viewing his own characterization of his own invention as what he invented, his position may be satisfactory.

The Court: That may be a matter for argument. [60]

Mr. Lassagne: We haven't yet gone into the

(Testimony of Wiliam Josephian.)

patent documents, but what I wanted to forestall was producing in the Court's mind the idea that this was accurate delineation of what the defendant was manufacturing and using.

Mr. Boyken: I want to be fair. That is not exactly a scale drawing. It is merely to illustrate what the defendant is doing. We have the actual device in court and, of course, that is what we intend to show was used. But that is so big we wanted something to show how it looked and how it was constructed.

The Court: To show the general construction without its being an accurate precise representation in actual dimensions.

Mr. Boyken: No, I do not pretend it is an actual scale drawing.

The Court: That would take care of what you have in mind?

Mr. Lassagne: That is all from this witness, then.

Mr. Boyken: I have no further questions.

I want to offer in evidence, your Honor, a certified copy of the file wrapper and contents of the patent in suit and ask that it be received as Plaintiff's Exhibit 9.

The Court: Is there any objection, Mr. Lassagne, to the file wrapper? I know that attorneys always offer these in patent cases. I have never gotten around yet to reading one of them. Unless there is some particular matter that counsel calls my attention to, I have never really, in all honesty,

[61] ever read one of the things from cover to cover, so if you have anything especially you want to point out in it, I think it would be well to do that at some stage of the proceedings.

(The file wrapper and contents were thereupon received in evidence and marked Plaintiff's Exhibit 9.)

Mr. Boyken: I want to read very briefly from this now.

The Court: Either now or at your convenience.

Mr. Boyken: It is so brief I would like to take it up now. As your Honor knows, this is a certified copy of what is in the patent. During the time that the application was filed, that is, from its filing date, January 14, 1942, until the date of the issuance of the patent, April 20, 1943, this shows what transpired during that period. And the first portion is the application exactly as it appears here in the patent. And then we have the claims at the end, just exactly as they are in the issued patent, except instead of the seven claims of the issued patent, when the application was first filed it had eight claims in it. So after the application was received with the petition, oath, description and drawing, the Patent Office acted on it. This is the first action of the Patent Office and the only action of the Patent Office.

Now, it was filed, as I say, on January 14, 1942, and on August 11, 1944, this is what the Patent Office said. There [62] are just three paragraphs here:

“In the drawings Figure 2 a full circle should be

shown in the center of Plate 6 to show the top of this central Tank 1. Plate 8 is rejected as indefinite and failing to point out and distinctly claim the invention as required by Section 4888 Revised Statutes.

“Claims 1 to 7 inclusive are allowable as the examiner is now advised.”

That is the end of the quote. That is all the Patent Office said. There was no citation of the prior art, lack of invention, or anything of that kind.

Then under date of January 26, 1943, a few months after the Patent Office action, the attorney who was prosecuting this action wrote to the Patent Office in reference to that Patent Office action and the response is as follows:

“Honorable Commissioner of Patents
Richmond, Virginia.

“Sir:

In response to office action of August 11, 1942, kindly enter the following amendment:

“Claim 8: Cancel without prejudice.

“Remarks: Cancellation of Claim 8 places this application in condition to be passed to issue of the allowed Claims 1 to 7 inclusive.”

In a separate letter applicant is authorized to change [63] in his drawings as required by the examiner. And then the attorney also writes to the Patent Office asking that the drawings be changed. I may say that that change is an immaterial change, and I am sure Counsel will agree with me in that there should be a full line of a certain tank shown

instead of this dotted line. That is all that happened. The drawing was changed, by the way, in that minor particular. Then on March 1, 1943, there is an allowance from the Patent Office and it says, "The application for a patent for an improvement in tank truck filed January 14, 1942, has been examined and allowed with eight claims," and then there is a lot of other reading matter, and the final fee of \$30 was paid and the patent thereupon issued. That is all there is in this file wrapper. [64]

The defendant offers in evidence at this time a series of three photographs referred to in Defendant's Request for Admission No. 2, which said, "A holder of a plurality of gas [72] cylinders manifolded together as shown in the photograph attached hereto as Exhibit B-1". I will have to offer them as Defendant's Exhibit A.

The Court: A?

Mr. Lassagne: "And a truck for handling said holder as shown in the photographs attached hereto as Exhibit B-2 and B-3". You will have to mark that A-1 and these next two will be A-2 and A-3.

(The photographs referred to in Defendant's Request for Admission No. 2, as Exhibits B-1, B-2 and B-3, were thereupon received in evidence and marked Defendant's Exhibits A-1, A-2 and A-3, respectively.)

Mr. Lassagne: Three photographs. We have referred to them as B-1—these were publicly used according to the request for admission in Los Angeles and vicinity by the Home Oxygen Company, commencing in January, January 1, 1941, for more

than one year prior to the filing of the application for the patent in suit.

The Court: I thought you had referred to them as exhibits—they were “B”, weren’t they?

Mr. Lassagne: They were “B” in the Request for Admission. I was offering them as “A” here because we haven’t yet offered an Exhibit A.

The Court: All right.

Mr. Lassagne: The next is a series of four photographs, [73] which are referred to in the defendant’s Request for Admission No. 3, I think we will again have to step the letter up one place in the alphabet and offer them as B-1 to B-4 inclusive.

The Court: B-1, B-2, B-3 and B-4—B-1 to B-4 inclusive.

(The four photographs referred to in Defendant’s Request for Admission No. 3 were thereupon received in evidence and marked Defendant’s Exhibits B-1, B-2, B-3 and B-4 respectively.) [74]

H. P. McKOON

called as a witness on behalf of defendant; sworn.

The Clerk: Please state your name to the court.

A. H. P. McKoon.

Direct Examination

Mr. Lassagne: Q. What was the manner in which it was used?

(Testimony of H. P. McKoon.)

A. That held approximately 150 cylinders that were tied together in groups of 4 by means of a spider manifold very similar to the one we are using on our present device, and the headers were run down the length of the truck, four headers were run down the length of the truck manifolding this group of 4 into the main header, and that was charged at our plant as a unit, towed off to the customer's plant and left there, hooked up by flexible cable to his point of use, and there were shut-off valves on each one of the four main headers into the lateral header at the end, and the customer could use that, the four at once, or generally he would use one at a time, one of the main headers at a time, one of the four main headers at a time, and then after it was empty it was disconnected and brought back to our plant.

We had some trucks hooked up in exactly the same way that we took out, and we brought those back.

Mr. Lassagne: I offer these in evidence as Defendant's Exhibits C-1 to C-4, inclusive.

The Court: They may be admitted and marked.

(Defendant's Exhibits C-1 to C-4 for Identification were thereupon received in evidence.)

Mr. Lassagne: Q. I show you the photographs which are in evidence as Defendant's Exhibits A-1 to A-3, and ask you if you ever observed units of that character in use.

A. Yes. [79] Those were the units that the Home Oxygen Company, in Los Angeles, used, and we

(Testimony of H. P. McKoon.)

at one time proposed to use. In fact, these particular photographs had the Stuart Oxygen printed on the cylinders, rather than Home Oxygen. We had these photographs made for advertising purposes but never actually put the units into service, although Home Oxygen did for years.

Q. With reference to those units, were the cylinders manifolded together so that they were filled, delivered, used and re-used as a unit?

A. Yes.

Q. How were those units moved from place to place?

A. You mean the——

Q. The Home Oxygen Company.

A. They had an ordinary warehouse type of lift truck. It is illustrated on the pictures.

Q. With reference to the device which is in evidence as Plaintiff's Exhibit 7, which is the present Stuart unit, and which is charged by the plaintiff to infringe the patent in suit, will you describe to us the manner in which those are used in your commercial practices, demonstrating, if you desire, with the unit which we have here in court?

A. Those are filled as a unit of four. In fact, we have the hand wheels taken off the valves, all except the main valve, hooked up to the manifold in our plant and filled and taken to and from the manifold by means of the hand truck, like, well, the one you have there—we have several of them of the same type. We have a stop on the floor—shall I get down and [80] illustrate?

Q. Yes, demonstrate.

A. We have a stop on the floor, which is a strip

(Testimony of H. P. McKoon.)

of steel about an inch wide and a quarter of an inch thick. That is put in the proper position in front of the manifold so that when we come up to the manifold, the tires hit that like it is hitting this now. It is in position. Then it is dumped forward and the truck can be taken back. They always come in the right position, so far as this is concerned, because of that stop. It may have to be moved and inch or so one way or the other to line it up with the pigtail, and then after they are stopped, this valve shut off, they are taken away with this same hand truck and they are put in storage or on motor trucks for delivery to customers.

At the customer's plant it is handled the same way. The agent's hand truck enters underneath the lip and this receives the cylinder, so that it can't come off; and then it is taken back in this position. The weight is carried by the third wheel and it can be handled in that way.

Q. So the record will be clear, will you describe what you were referring to when you said, "this receives the cylinder so it will not fall off"?

A. This point of metal here and this slot in here which catches the little bit of this that projects, so it is caught at two points, top and bottom.

Q. Is that, then, a truck specially constructed for moving this type of unit as distinguished from a general purpose truck? [81]

A. Oh, yes, this truck is especially constructed. It is ordinarily used as a two-wheel truck, but when they are pretty heavy you can make a three-wheel

(Testimony of H. P. McKoon.)

truck out of it. This would be in the way handling anything else, and that slot would be in the way handling anything else.

Q. The feature that would be in the way in handling anything else is the triangular metal going between the cylinders when you place the units on the truck? A. Yes.

Q. Is it your practice under any circumstances to move those units except in adjusting them as you illustrated in your testimony by rolling them on the depression in the center of the plate?

A. No, we have one of these trucks on our filling platform at the plant and we have three or four others that are either carried on the trucks or left at the customer's place of business in some cases. We never have them in any other way except on these trucks.

Q. Has that been true ever since you commenced the use of these cylinders?

A. Well, the first truck we had was similar to this ordinary warehouse truck here. We always handled them on a truck, although we did not get this truck until we had the first few units a week or so and worked this thing out especially for the job.

Mr. Lassagne: I would like at this time to offer the special hand truck concerning which the witness has been testifying in evidence as Defendant's Exhibit D, subject [82] to the same stipulation that it may be withdrawn and photographed with the unit of cylinders if desired.

(Testimony of H. P. McKoon.)

Mr. Boyken: Yes, that is agreeable, your Honor.

(The hand truck in question was received in evidence and marked Defendant's Exhibit D.)

Mr. Lassagne: Q. Now, in commercial use of your devices, do you know of any cases in which the customer has occasion to move these devices from place to place?

A. No, we do not encourage customers to move them. They are pretty heavy.

Q. How are they used in the customer's premises?

A. They are ordinarily hooked right up to the manifold at the customer's place of business, that is, they are manifolded back in a central line just the way new cylinders are handled in bigger place, and all the customer does is open and close some valves.

Q. What I understand you to refer to when you say the manifold at the customer's place of business is something like the gaspipe in a residence in a country hookup of butane gas?

A. No, the customer ordinarily has a platform the same height as the truck, and on the back edge generally of that platform is a pipe with outlets spaced about the same distance apart as that thing is wide, or giving a few inches leeway, and these are lined up by means of one of those stops I have described in front of that pipe manifold and attached by flexible connections.

Q. Where does the manifold go?

A. Then there is a pipe-line [83] off that mani-

(Testimony of H. P. McKoon.)

fold that goes through the customer's shop. At some places there are one or two places and sometimes he has an elaborate piping system throughout his shop.

Q. He takes off with welding instruments from that pipe-line?

A. Cutting equipment at different points.

Q. Are you acquainted with a person named Molinari, to whom Mr. Josephian referred in his testimony?

A. Yes, I am.

Q. Was Mr. Molinari employed by you to construct units of the kind exemplified by Plaintiff's Exhibit 7?

A. Mr. Molinari constructed those units in his shop for us, not as an employee, but as a contractor.

Q. Had Mr. Molinari ever been an employee of yours?

A. Mr. Molinari was an employee of ours. He was definitely on the payroll from November, 1934, through August, 1936. Prior to 1934 he had worked for us either as a contractor or an employee—I am not sure which. I couldn't find the old payroll records. And then between—some time after August, 1936, he worked for Mr. Josephian for, I believe, a couple of years. And recently he has reopened—well, he always did have a little shop across town which he ran more or less part time, and which he recently reopened, and he has been making several different items for us in that shop, including these units.

(Testimony of H. P. McKoon.)

Q. To the best of your information, then, he was an employee of yours long before he was an employee of Mr. Josephian? [84]

A. He was an employee of ours before Mr. Josephian was in the oxygen business.

Q. I hand you a blueprint which I will first ask to be marked for identification as Defendant's Exhibit E and ask you what it illustrates, if you know?

(The blueprint was marked Defendant's Exhibit E for Identification.)

A. It illustrates the Stuart Oxygen Company's present unit as shown here.

Q. The dimensions shown on that blueprint correspond in every particular to the units which you have manufactured and used, and which are exemplified by Plaintiff's Exhibit 7? A. They do.

The Court: According to scale, you mean?

Mr. Lassagne: To scale drawing.

The Witness: Yes. It is off scale in one or two places, but it is indicated where it is off scale by the broken lines. It is a construction drawing.

Mr. Lassagne: Q. The dimensions are shown numerically as well as the drawing, itself, being to scale? A. Yes.

Mr. Lassagne: I will offer that in evidence, then, as Defendant's Exhibit E.

The Court: Very well.

(Defendant's Exhibit E for Identification was thereupon received in evidence.) [86]

Mr. Lassagne: That is all. You may cross-examine if you wish.

(Testimony of H. P. McKoon.)

Cross-Examination

Mr. Boyken: Q. Mr. McKoon, I understand that the Stuart Oxygen Company at one time had these trailers such as shown in Defendant's Exhibits C-1, C-2, and C-3. Do you still use those trailers?

A. No, we discontinued the use of this, oh, I don't remember how long it was. It was some time ago.

Mr. Boyken: I would like to show your Honor one of these, if you have not seen them. The tanks are on a trailer.

Q. These views are all of the same trailer, are they? A. They are all of the same trailer.

Q. Now, over what period of time did you use these tanks on the trailer that way?

A. For a period of about three or four years.

Q. Three or four years. That is between about 1941 and something like 1943 or 1944?

A. 1943 or 1944, some time in there.

Q. About the beginning of 1944?

A. I wouldn't place the month exactly, but I——

Q. Now, these tanks were all hooked up in line or manifolded, as we say? A. Yes.

Q. Were they individual tanks?

A. Yes, they were standard tanks.

Q. Standard tanks like these in here?

A. Yes, exactly. [87]

Q. Were they on any base of any kind?

A. The bed of the truck.

Q. The what?

A. They were on the bed of the truck.

(Testimony of H. P. McKoon.)

Q. But they were not on anything like this stand that I have? A. No.

Q. Which is the one you now use?

A. Yes.

Q. And they were the ordinary oxygen tanks on the bed of the truck? A. Yes.

Q. And you brought that up to the job?

A. Yes.

Q. Why did you discontinue using that?

A. Well, we had those in on two installations: One was at Moore's Dry Dock, who put in the Linde system, which Mr. Josephian was referring to a while ago, and the other one was at Best Foods, who put in their own plant. The other one was on a hydrogen service, rather than oxygen, and that was the Best Foods Company, who put in their own plant.

The Court: I did not hear what you just said.

The Witness: They put in their own plant to make their own stuff. In other words, we lost the account, lost the business of both places.

Mr. Boyken: Q. Then you only used these trailers for two accounts that you had?

A. The two very large accounts.

Q. The two very large accounts, and you moved that trailer with the oxygen tanks on there right up to the job, left the trailer there——

A. Yes.

Q. What did you do when all the oxygen was gone?

A. Brought [88] another one.

(Testimony of H. P. McKoon.)

Q. Brought another trailer to take its place?

A. Yes.

Q. You only used it on those two jobs, and the reason that you did not continue to use the trailer was that you lost the jobs. Why didn't you use them on some other jobs?

A. Well, in the first place, they are only adapted to a certain type of customer. You have to have room to spot the things, to leave it there, and not everybody uses in that quantity. That is a pretty big unit.

Q. You could have had smaller trailers?

A. Then it is uneconomical to run smaller trailers.

Q. In any event, you did not have to move the individual tanks around on those trailers, did you?

A. No.

Q. I understand you also were considering, or, at least, you thought you might use something like the units shown in Defendant's Exhibits A-1, A-2, and A-3, is that right?

A. Yes, we considered those.

Q. But you never actually used those?

A. No, we never actually used those.

Q. Now, with respect to those photographs, how many oxygen tanks did you have connected up in a unit?

A. Ten.

Q. And they are on a stand of some kind?

A. Well, they are on a base like that, which will take a lift truck underneath.

Q. Which will take a lift truck underneath?

(Testimony of H. P. McKoon.)

A. A steel base, a good deal like a pallet that is used in a warehouse. [89]

Q. They had legs under there, didn't they?

A. Yes.

Q. And you could get under them with a lift truck and those bases were, let me say, oblong in appearance?

A. Rectangular.

Q. Rectangular is a little better.

A. Rectangular.

Q. There wasn't anything circular like what you are now using? A. No.

Q. When was it you first used the form shown in Plaintiff's Exhibit No. 7?

A. Sometime around the first of last year, I would say. I didn't look up the date exactly.

Q. The first part of 1944?

A. 1945.

Q. 1945? A. Yes, sir.

Q. And you have continued to use those ever since, have you?

A. Yes. We have been using them for about, oh, a little over a year, now, I guess.

Q. How many of those units have you got?

A. Around a hundred.

Q. Do you deliver those units out to the customer's plant like Mr. Josephian does?

A. Oh, to some customers, yes. We have a few accounts lined up for them.

Q. Was that the first time, then, that you ever

(Testimony of H. P. McKoon.)

sold those four oxygen tanks together, in one cluster?

A. Yes, that is the first time we used the four-cylinder unit.

Q. The first time that you ever mounted four cylinders on a circular base was also in 1945, the early part, was it not?

A. That was the first time we used anything like that.

Q. When you take a four-cylinder unit like that shown here [90] in Plaintiff's Exhibit No. 7 to a customer, how do you take it there? On a truck?

A. Yes.

Q. There are a number of these on a truck?

A. Yes.

Q. Automobile truck, and then you take them off the truck and, as I understood you, you use this little hand truck? A. Yes.

Q. After you take it off the hand truck how do you spot it so that it gets in the exact position you want it?

A. Most of them you don't have to do any further spotting after you take it off the truck, because, as I explained, you have that stop there.

Q. I am interested in this that you have to build, that you have to do something to.

A. If you missed your spot an inch or two, you just inch it over.

Q. What does it roll around on? What portion of the device?

A. Well, you just rock it on the base.

(Testimony of H. P. McKoon.)

Q. You just rock it on the base?

A. Yes.

Q. Until it gets in the exact position so you can line it up with the other one? A. Yes.

Q. Prior to the time that you ever used such a device as that did you have a base that had a circular portion around underneath at all?

A. No.

Q. Why do you have to have a circular base and a circular track on there in order to get the hand truck underneath?

A. You don't. You can use any other steel. But that is very simple and inexpensive to press out.

Q. You could have used a square base, could you not? A. You could have.

Q. And you could have used a rectangular one as shown in Defendant's Exhibit A-1, A-2, and A-3, could you not?

A. Oh, yes, the square base would have been very satisfactory.

Q. A square one would have been very satisfactory? A. Yes.

Q. All you had to do was to raise it up high enough so you could get underneath?

A. Yes.

Q. Why didn't you use the form shown in Defendant's Exhibits A-1, A-2, and A-3, then?

A. Well, we wanted a four-cylinder unit that we could handle with a two- or three-wheel truck rather than this ten-cylinder affair. There wasn't a

(Testimony of H. P. McKoon.)

demand for the ten-cylinder affair that there was for the four-cylinder one.

Q. You could have made it a little smaller, couldn't you?

A. Well, it is out of proportion for that kind of a truck then.

Q. Now, you spoke about Mr. Molinari, and I understand he was first employed by you and then by Mr. Josephian. You say he was in business for himself at the time he designed your four-cylinder unit?

A. I never said he designed a four-cylinder unit.

Q. Who designed that, then?

A. That was worked out by Mr. McCabe and Mr. Molinari, and I had a finger in it, too.

Q. Who is Mr. McCabe?

A. He is the head of the shipping and traffic.

Q. And Mr. Molinari and yourself?

A. Yes.

Q. Now, you were familiar with the Josephian four-unit device at that time, were you not?

A. Yes.

Q. And Mr. McCabe was? A. Yes.

Q. And of course, Mr. Molinari worked for Mr. Josephian? A. Yes.

Q. So the three of you designed the unit that you now use? A. Yes.

Q. At that time you say Mr. Molinari was in business for himself?

A. He had come back and started to work there at his shop, which is down the other side of town.

Q. And he built your first unit at his shop?

(Testimony of H. P. McKoon.)

A. Yes.

Q. I don't know if you told us just when that was completed. I think you said when you first commenced using it, but when did he work on this?

A. I am not sure. I would have to look through the records.

Q. He built the first model you had?

A. Yes.

Q. Was it a full-sized device?

A. Yes.

Q. Four cylinders, just like the one in evidence here? A. Yes.

Q. And as shown in this blueprint?

A. Yes.

Q. Did you have the Josephian patent in front of you when you designed this device?

A. We were familiar with the Josephian patent.

Q. Is there a guard over this unit when you deliver it to the job, that is, the unit shown by Plaintiff's Exhibit No. 7? [93]

A. We do not ordinarily use it. We have a provision there for a cylinder rack, but handling it on our own trucks we do not.

Q. You have one painted in red, here?

A. Yes.

Q. Do you ordinarily put that there?

A. We do not ordinarily put that there.

Q. What do you use that guard for?

A. We provided it so you could use it. It gives protection to that extra valve. But handling it on our own trucks we do not in practice use it.

(Testimony of H. P. McKoon.)

Q. And you do not use it when you deliver the unit to the job? A. No.

Q. By the way, is the American Forge Company, of Berkeley, one of your customers? A. Yes.

Q. And they have some of these four-cylinder devices in unit form, such as Plaintiff's Exhibit 7?

A. Yes.

Mr. Boyken: I have no further questions.

Redirect Examination

By Mr. Lassagne:

Q. With respect to this unit, Plaintiff's Exhibit No. 7, Mr. McKoon, why is it that you are able to omit the conventional type of valve cap not only from the central valve but from the individual valves of the four cylinders?

A. We have the other valve guarded by position by that handrail up there, and we have—we can if we ever want to ship them by rail or any place where anybody objected to them being shipped without protection, provision for guarding [94] the other valve that stands up.

Q. Do you find any corresponding guarding of the valve in the Josephian device exemplified by Plaintiff's Exhibit 8? A. No.

Q. I hand you a further drawing, which I will ask to be marked for identification Defendant's Exhibit F, and I ask you what it shows.

(The document was thereupon marked Defendant's Exhibit F for Identification.)

(Testimony of H. P. McKoon.)

A. That is a drawing of the hand truck that I just had out there.

Q. You refer to the handtruck which is Defendant's Exhibit D, and I will offer this in evidence as Defendant's Exhibit F.

The Court: That shows the dimensions?

Mr. Lassagne: It shows the dimensions and the proportions of the hand trucks so we may have a pictorial record after the physical exhibits are withdrawn.

The Court: It may be admitted.

(The document previously marked Defendant's Exhibit F for Identification was thereupon received in evidence.)

Mr. Lassagne: No further questions, Mr. McKoon.

The Court: That is all. [95]

WILLIAM A. DOBLE,

called as a witness on behalf of the defendant; sworn.

The Clerk: Q. Please state your name to the court.

A. William A. Doble.

Direct Examination

By Mr. Lassagne:

Q. Will you state your qualifications, Mr. Doble, particularly in the field of mechanical engineering and patents which may be relevant to your quali-

(Testimony of William A. Doble.)

fications to give opinion evidence in this court regarding the structures here involved?

A. I specialized in mechanical engineering in university, leaving the university during the first World War to accept the position as first lieutenant in the ordnance department. After the completion of the first World War I associated with my brothers, specializing in engineering of high pressure steam power plants. During that time we used a great many tanks for welding and cutting purposes.

Later—and I would say for the past twenty years—I have specialized in a consulting practice, specializing in patent litigation, that is, preparing cases for trial, as well as analyzing patent situations for various manufacturers. I have acted as consulting engineer and helped them with the design of special machinery, and during the last World War I served in the ordnance department, which is the manufacturing department of the Government, and at one time had charge of the manufacture of 90 to 105 millimeter howitzers [96] at San Jose. I have studied the patent in suit and am familiar with that type of structure.

The Court: Q. Do you live out in Sea Cliff, San Francisco?

A. That is my mother's home, Judge.

Q. I knew there was a Doble who lived there below us where we used to live at Sea Cliff. You do not reside there?

A. No. That is my mother.

(Testimony of William A. Doble.)

By Mr. Lassagne:

Q. Will you outline briefly your previous experience for giving testimony in patent infringement actions in Federal courts?

A. I have experted in the case of Killifer vs. Roderick Lean, the case of Towner v. Bernice——

Q. Mr. Doble, I do not mean for you to enumerate them all, but give some idea of the number.

A. I would say twenty or thirty cases, at least.

Q. Will you explain to the court from your study of the patent document of Mr. Josephian involved in this suit what is described therein as the preferred embodiment of Mr. Josephian's invention, and what the novel and advantageous features stressed therein are?

A. May I use the easel and chart and pointer to point out the structure?

Q. Yes. This chart is simply an enlargement of the single sheet of the patent drawings.

A. Does this chart have an exhibit number?

Q. No, it is simply an enlargement of the first sheet of the patent drawings and the patent itself is in evidence. [97]

A. I will refer to the chart, which is entitled, "Tank Truck," and it is a chart of the patent to Josephian, No. 2,317,064, which is an enlargement of the only sheet of the drawings in this patent to Josephian.

The structure illustrated in the enlargement includes a truck mechanism, by which seven oxygen cylinders indicated by the reference character 1

(Testimony of William A. Doble.)

are nested together, six of the cylinders encircling the seventh cylinder, which is in the center of the group. That group of cylinders are mounted upon a base plate 8. A corresponding plate 6, having orifices 7 of such size as to nicely fit over the neck portions of the cylinders 1, is mounted upon the top of the seven tanks to hold them in adjustable position. Then the two plates are securely tied together by the tie rods indicated by the reference character 9, and nuts 10 located at each end of the tie rod 9 above the upper plate 6, and below the lower plate 8.

The seven tanks are all connected to a central valve 4, which is mounted on the top of the center tank. The manifold is shown by the reference character 13. By that arrangement an operator opening the main valve 4 may draw oxygen or other gas from all of the seven cylinders.

Welded to the bottom portion of the lower plate 8 is a circular track 11. As called for in that patent, the track is an annular member, circular in cross section, and [98] is welded to the plate concentric with the base plate. In normal operation the truck, as Mr. Josephian calls it, is mounted as shown in Fig. 1 with the lower edge of the circular track in engagement with the support 16.

One of the advantages of this structure, as brought out in the patent, is to provide a truck by means of which a plurality of gas cylinders 1 may be removed from one location to another by rolling. That is, the truck, including the seven

(Testimony of William A. Doble.)

cylinders shown in Fig. 1, may be tilted to the position shown in Fig. 3, in which case the periphery of the circular track 11, the periphery referred to by the reference character 12, engages the support 16 at a point of contact 17.

The operator, by engaging the upper portion of the structure may wheel or roll the unit to any place in the shop that he so desires, and in that connection I call attention to the patent, referring to the wording in the first column, page 1, line 50, reading: "It is another object of my invention to provide means for clamping a plurality of tanks into a unit which can be readily moved from place to place by tilting and rolling together with means for reducing the danger of upsetting."

Then again, commencing at line 54 in the first column at page 1 and continuing over to the top of the next page,—

"Under these conditions the tanks are easily handled, and even though the unit weighs in the neighborhood of 1000 pounds, the unit can be readily moved by tiling and rolling [99] without danger of the unit overturning."

I would like to also call attention to the paragraph starting at line 4 on page 2 in the second column.

The Court: Isn't this argumentative, Mr. Lassagne?

Mr. Lassagne: I think, your Honor, he is pointing out the structural features which will become important when we consider the claims.

(Testimony of William A. Doble.)

The Court: I can read this patent, too. I have never been particularly impressed with the method of presentation by which the expert reads the portions of the patent, because I have always felt that that was rather argumentative. If there is something that needs explanation in the device, of course, the expert can be helpful to the court in that regard. But this is comparatively a simple mechanical situation, and as ignorant as I am of complex mechanical things, I can understand this.

Mr. Lassagne: I am between two fires, or the devil and the deep blue sea in a situation like this, your Honor, because some courts have refused to consider patents, particularly prior art patents, in the absence of an explanation of them by an expert, and other courts will take the reverse position, that they can read them for themselves.

The Court: That is in cases where you have a number of other patents against which comparisons are made, it is, of course, helpful to have an expert point out the differences or [100] the similarities to the court. But in a case where I have just this patent, no doubt the witness has studied this matter and is familiar with it, but he is at the moment doing no more than reading the provisions of the patent and explaining the make-up of the device, which I already, I think, understand, because I have had it visually demonstrated to me, and it is comparatively simple to see. In fact, you can take it in with the eye and see it, which is something that you cannot ordinarily do with some of the

(Testimony of William A. Doble.)

patents. However, I suppose I am wasting more time in discussing this than the witness would occupy in concluding his statement. It is hard for me to pay attention to it, because I have already seen it. You have read to me some portions of this patent already, and I am not able to follow just what the point is.

Mr. Lassagne: We do not want to be repetitious, and I think we can proceed directly to the point with that expression of views.

The Court: We will adjourn until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until tomorrow, Wednesday, May 1, 1946, at 10:00 o'clock a. m.)

Wednesday, May 1, 1946, 10:00 o'clock a. m.

The Clerk: William Josephian vs. Stuart Oxygen Co. on trial.

WILLIAM A. DOBLE

recalled.

Direct Examination (resumed)

Mr. Lassagne: In view of the discussion at the close of the session last night, your Honor, I have made a diligent effort to confine my further examination of Mr. Doble to eliciting necessary answers to two prime questions: First, what did the plaintiff particularly point out and claim as his inven-

(Testimony of William A. Doble.)

tion in his patent, that is, what did he ask for a patent on, and, second, does the defendant's cylinder holder embody that thing in the case or any mechanical equivalent form?

Q. Mr. Doble, this patent and its title, repeatedly in its specifications and in its claims, calls the plaintiff's device a truck. What is the meaning of the word "truck?"

A. The common meaning of the word "truck" is a vehicle, and in that connection I will quote from Webster's New International Dictionary, published by G. & C. Merriam Company, 1919, appearing upon page 2206, and the second definition is as follows. This is the definition of truck:

"Any of numerous vehicles for transporting heavy articles, especially (a) a kind of handbarrow or hand cart consisting essentially of a strong braced frame terminating in a pair of handles at one end and supported [104] on a pair of small heavy wheels with broad rim.

"(b) A small heavy rectangular frame supported on four small wheels used instead of rollers for moving heavy objects, as on a floor.

"(c) Any of various small flat-topped cars for pulling or pushing by hand with or without a handle and sometimes with stakes or vertical ends to prevent the load from falling off. Used in shops, railroad stations, and so forth, for moving heavy articles.

"(d) Any strong heavy cart or wagon, horse-drawn or self-propelled, for heavy hauling."

(Testimony of William A. Doble.)

Q. In other words, it boils down to the fact that a truck is a vehicle for moving something as distinguished from a mere passive holder of a thing, does it not? A. That is correct.

Q. What is the descriptive term "truck" as applied to the plaintiff's patent?

A. The truck as described, illustrated and claimed in the Josephian patent is a vehicle for transportating a number of cylinders from one place in the shop to a second place in the shop. In other words, it is a transporting vehicle.

Q. Will you point out any structural feature of the plaintiff's device that particularly adapts it to serve as a vehicle rather than as a mere holder?

A. Yes, I can. In the plaintiff's device the structure which permits that truck to be used as a vehicle is a cylindrical track 11, which is welded [105] to the bottom plate 8.

Q. How is that particularly adapted to serve as a vehicle?

A. If I could have one of the models to demonstrate with, I could demonstrate clearly.

Mr. Lassagne: I will ask that this be marked for identification Defendant's Exhibit G.

(The model was marked Defendant's Exhibit G for Identification.)

By Mr. Lassagne:

Q. Will you identify the model which I have placed before you, Mr. Doble, and then proceed with your explanation?

A. The model which you handed me is Plain-

(Testimony of William A. Doble.)

tiff's Exhibit G for Identification, and is a model which was constructed under my direction by a model maker, and closely follows the drawings and teachings of the Josephian patent. It is a representation of the Josephian truck as illustrated in the drawings of that patent and as described in the specifications of the patent.

Your Honor, may I demonstrate this on your desk?

The Court: Yes.

The Witness: The truck is now placed in its first stable position. The welding at this particular locality in the shop has been completed. The patent teaches if, for example, welding is to be accomplished across the courtroom here, that the truck can be operated as a vehicle to convey the group of tanks to the locality for use. To do so the operator [106] will tilt the unit until the center of the gravity of the unit lies substantially over the point of contact 17, where the track engages the support, and then merely by rotating the unit, as I am now rotating this Exhibit G for Identification, we can transport the truck across the shop to the new locality.

In transporting the truck and rotating it, as I am now rotating the truck, to make it travel along the support, he soon obtains a point of balance so that the main effort that he has to apply to the truck is merely that of turning the truck structure so that it wheels along on the circular track 11. In other words, the circular track acts as a wheel in

(Testimony of William A. Doble.)

that case, the wheel of the vehicle, to move that structure to a new place of operation.

Mr. Lassagne: I offer Defendant's Exhibit G for Identification in evidence.

The Court: It may be admitted.

(The model was thereupon received in evidence and marked Defendant's Exhibit G.)

By Mr. Lassagne:

Q. Is there anything in the patent specification inconsistent with the thought that the plaintiff's patented device is designed to be transported on a conventional hand truck such as they have used in this court?

A. Yes. The patent clearly states that the truck or vehicle is to be operated or manipulated without the aid of any mechanical device, either transporting or spotting.

Mr. Lassagne: I will ask that this model be marked [107] Defendant's Exhibit H for Identification.

(The model was marked Defendant's Exhibit H for Identification.)

Mr. Lassagne: Q. I hand you a second model, which has been marked Defendant's Exhibit H for Identification, and ask you if you can identify it.

A. Yes. The model which you have handed me for identification Exhibit No. H is a model representing this Stuart holder, which I had made under my supervision by a model maker.

Q. Is the defendant's device which is in evi-

(Testimony of William A. Doble.)

dence as Plaintiff's Exhibit 7 here, of which the model you have just identified is a reduced scale exemplification a truck?

A. No, it is not, in the sense a truck as plaintiff's device is a truck, for this reason, that if we take the same example of having completed a welding operation on this side of the courtroom and wished to perform a welding operation on the opposite side of the room, a hand truck, specially-built hand truck, as illustrated in Defendant's Exhibit F, I believe that is, is used as the conveying vehicle or the truck to carry, bodily carry, the unit to the new place of location where it is to be operated.

Q. The defendant's hand truck was Defendant's Exhibit D? A. Exhibit D. Thank you.

Q. Can you point to any particular—

A. I hadn't quite finished, Mr. Lassagne. [108]

Q. I beg your pardon.

A. Pardon me, go ahead.

Q. Can you point to any particular structural difference between plaintiff's and defendant's devices which causes you to say that the plaintiff's is a truck while the latter is not?

A. Yes. In the plaintiff's device, plaintiff's truck, it is provided with a circular wheel, which acts as the wheel in transporting the truck in its normal operation. The unit is tilted until the center of gravity is substantially directly over the point of contact of that truck with the ground, and then acts as a wheel to transport the truck to where

(Testimony of William A. Doble.)

it is desired. In defendant's structure the base plate has a depression, which is also circular, but does not meet the specifications of the patent, in that it does not permit the unit to be tilted to a position where the center of gravity can be moved, or shifted directly over the point of contact of the depression in the base, and therefore does not act as effectively or efficiently, and in order to wheel the unit it requires an added force. The operator must not only then rotate the unit, but he must manually hold the unit in its tilted position. Where with the Josephian device it will balance in its operation of transporting it, the operator naturally will take the easiest way of transporting it, will balance it where the center of gravity is substantially over the point of contact of the track, and therefore we find a distinction in the two. [109]

The Josephian truck to be transported requires but a single force to be applied by the operator, whereas in the defendant's structure the operator must apply two forces, because the structure is not the same. The proportion of the ring 11, which is the wheel of the truck, is made sufficiently high and of sufficient diameter to enable the tilting of the center of gravity to be directly over the point of contact. That structure, mode of operation and result is not found in defendant's holder.

Q. What is the magnitude of the additional force pulling toward you that you told us the operator had to exert in moving the defendant's device?

(Testimony of William A. Doble.)

A. It will be somewhat greater than a minimum of six pounds. It probably would be in the order of ten to fifteen pounds.

Q. What is the force in the same direction that need be exerted in the case of the plaintiff's device, if any?

A. There will be no additional force required in that respect. It will balance when the center of gravity is over the point of contact.

Mr. Lassagne: At this time I will offer Defendant's Exhibit H for Identification in evidence.

The Court: Very well, it will be admitted and marked.

(Defendant's Exhibit H for Identification was thereupon received in evidence.)

Mr. Lassagne: Q. Now, referring to the models in evidence [110] as Defendant's Exhibits G and H, will you point out whether you find in the Josephian device a lower plate or base plate upon which the tanks were supported, and where that element is?

A. Yes. The base plate in the Josephian model, which is Defendant's Exhibit G, is the bottom plate upon which the seven cylinders are mounted.

Q. What element of the Stuart structure performs the structure of supporting the tanks?

A. In the Stuart carrier, Defendant's Exhibit H, there is a green plate at the bottom of the structure, upon which the four cylinders are mounted.

(Testimony of William A. Doble.)

Q. What do you find in the Stuart device which performs the function of holding a plurality of tanks in upright position at the top of the plate?

A. In the Stuart device I find a standard, a vertically extending standard, which is fastened to the base plate, and can be clearly seen in the stand which is on the floor of the courtroom. That standard extends vertically from the base plate and has four outwardly-extending wings, to which a nut structure is welded, and then a band surrounds the tanks and is secured to these metallic wings which project from the standard. In that way the four tanks are securely fastened, not to the base plate directly, but to the standard, which in turn is fastened to the base plate.

Q. How does this compare with the means disclosed in the Josephian patent for holding the tanks in upright position [111] at the top of the plate?

A. It is quite different from the means disclosed in the Josephian patent, and is shown in Defendant's Exhibit G. The means for clamping the cylinders to that truck include a top plate, which is identified in the patent by the numeral 6, and the lower plate or the supporting plate, which is identified in the patent by the numeral 8, and tie rods 9 with nuts 10 for clamping the two plates together, and the tanks between the two plates. In the Josephian device the tanks are clearly clamped to the bottom plate directly.

Q. Have you seen the devices illustrated in the photographs in evidence as Defendant's Exhibits

(Testimony of William A. Doble.)

B-1 to B-4, inclusive, those devices being identified as those used at the Western Pipe & Steel Company?

A. I have visited the plant of the Western Pipe & Steel Company and there I have observed and made close observation of about 33 tank carriers of the type shown in Plaintiff's Exhibit—Defendant's Exhibits D-1 to D-4 inclusive.

Q. Do they have a circular base plate supporting a plurality of cylindrical gas tanks?

A. Yes, they do. Shall I point out in the photograph and mark it where I find that supporting plate?

Q. I think it would be well if you have a large enough picture of one to do that.

A. Yes, this is a very good picture.

Q. Then mark the supporting plate A.

A. I will now mark the [112] supporting plate on Defendant's Exhibit B-1 with the letter A. Incidentally, there are several of the carriers shown in that same photograph, but I have added the "A" to the one in the upper right-hand corner.

Q. What means do those holders use for holding cylindrical tanks in fixed upright position on top of that plate you marked?

A. A means which is substantially the same as that used by the defendant in this case, that is, extending upwardly from the base plate A there is a standard. Projecting outwardly from the standard there is a wing forming a socket for each of the tanks, and at the upper end of the tanks

(Testimony of William A. Doble.)

there is a strap surrounding the tanks which engages the outwardly extending wings to clamp the tanks to that carrier.

Mr. Boyken: May I ask has the witness actually seen these or is he describing the photographs?

Mr. Lassagne: He has testified he has seen them.

Mr. Boyken: Q. Were you there when the photograph was taken, Mr. Doble?

A. No, Mr. Boyken, I was not.

Q. You have seen it recently? A. Yes.

Q. Was it the same as it is in the photograph?

A. As far as I can tell from the photograph it is identically the same.

Mr. Boyken: I see no good in describing this photograph unless you have seen those, yourself.

Mr. Lassagne: He has testified he has seen the devices.

The Witness: I have seen the devices, a great many of them. [113]

Mr. Lassagne: Q. Does the handrail structure of the defendant's device, which handrail structure surrounds the valves of the tanks mounted in the Stuart holder, constitute the mechanical equivalent of the upper plate designated 6 in the Josephian patent? A. No, it does not.

Q. Why do you say that it does not?

A. It does not for the reason that the upper rail which you have referred to on the Stuart device for protecting the valves may be entirely re-

(Testimony of William A. Doble.)

moved and the clamping means provided for the tanks will still effectively hold the tanks in their clamped position. There is no relationship whatsoever between the handrail and the clamping means for the tanks or cylinders.

Q. Now, will you point out where you find in the Josephian device the thing described in the language of the patent as a basal member fastened to the bottom of said lower plate and having a circular periphery centrally located with respect to the periphery of said plate to support said truck in upright stable position, said truck having a second stable position when tilted to rest on both of said peripheries only?

A. Yes. As I have pointed out before, the Josephian truck is provided with a circular track 11. It is also provided with a base plate 8, to which a circular track is welded. I am now pointing on the model Defendant's Exhibit G to the circular track 11 and to the place on the model where that circular track is welded to the base plate. That structure [114] is so proportioned, as called for in the patent, that when the unit is tilted from a first vertical position to a tilted position, that the center of gravity which I can point out on the enlarged photostat of the Josephian patent on the easel—the center of gravity of the Josephian truck is indicated in Fig. 1 of the patent with a large dot, slightly above the center of the tank structure, and is indicated or designated by the numeral 15, and in Fig. 1 the center of gravity rests within the center line of the structure. The Josephian patent

(Testimony of William A. Doble.)

defines that the diameter or the height of the circular track 11 must be such with relation to the diameter of the lower plate 8 that when the unit or truck is tilted to a second, or what we might call a second stable position as shown in Fig. 3, a vertical line dropped from the center of gravity indicated by the numeral 15 will lie between the point of contact of the circular track 11, which is indicated on the patent by the numeral 17, and the point of contact 20 of the bottom plate 8 with the supporting member 16.

That particular relationship, which is so thoroughly defined in the Josephian patent, brings the effective center of gravity between the contact point 17, the contact point 20, and as a result the truck is given a second stable position and will remain as Defendant's Model G remains in a tilted position, and likewise Plaintiff's Exhibit 8 will remain in that same tilted position or, as called in the patent, the [115] second stable position, and those structures, both the model, the device of the patent, and the commercial structure manufactured by the Josephian Company will remain in those stable tilted positions until a force is applied to swing the center of gravity back to a point slightly to the center side of the point of contact, at which time the unit will return to its first stable position.

I will demonstrate with the model, pressing on the upper end, turning it gradually, that we are approaching a balance where the unit will almost stand up by itself, and when I tilt it slightly beyond

(Testimony of William A. Doble.)

that, the unit will rock to its first or normal stable position.

Q. Do you find in the specification of the Josephian patent in suit any definition of what is meant by a second stable position? A. Yes, I do.

Q. Will you point out and briefly read from that part of the specification so that we may know where it is?

A. I am reading from the Josephian patent, page 2, column 1, line 59:

“In any event, the advantageous result of my invention can be accomplished by so designing the lower plate and its attached track so that there will be a second stable position such as that shown in Fig. 3 after the tank has been tilted.”

This simply means that the center of gravity 15 is to [116] lie between the vertical lines erected from the contacts 7 and 20.

Q. Is the point of contact 7 properly identified in the part of the specifications from which you just read?

A. No, that is an error in the patent. The point of contact referred to is No. 17 and not 7.

Q. How do you know that?

A. Because the patent states in another portion describing that point of contact, principally between the lines 15 and 20, the first column, the second page of this Josephian patent, and in other parts of the patent.

The Court: Q. 7 is really the point where the valve comes through, isn't it?

(Testimony of William A. Doble.)

A. Yes, your Honor, and 17, you will notice, in Fig. 3, is the point of contact. Both the drawings and the specifications indicate that the figure 17 represents the point of contact of the circular track 11 with the support 16.

The Court: It is apparently a typographical error.

The Witness: That is what it is, your Honor.

Mr. Lassagne: In his cross-examination Mr. Josephian characterized what he meant by a stable tilted position as follows, reading from page 52 of yesterday's transcript, line 21:

"Q. Incidentally, what do you regard as a stable position as the word is used in that patent? [117]

"A. I regard stable position with regard to the patent as a place where the unit stops and a greater force has to be applied in order to bring it on over before it falls down.

"Q. Don't you understand the term 'stable' as describing a position in which it will stay if you take your hands off of it?

"A. Not necessarily."

Do you agree with Mr. Josephia's definition of what the term "stable position" means?

A. Absolutely not. His own patent does not agree with him. His own patent defines a stable position as one in which the device, as I have illustrated, and in which Defendant's Model G now stands, as a stable position, where it will rest in that position until an outside force is applied to move it to some other position.

(Testimony of William A. Doble.)

Q. Do you find anything in the defendant's device in evidence as Plaintiff's Exhibit 7 susceptible of being described by the language "A basal member fastened to the bottom of said plate and having a circular periphery centrally located with respect to the periphery of said plate to support said truck in upright stable position, said truck having a second stable position when tilted to rest on both said peripheries only"?

Mr. Boyken: Are you reading from the claim of the patent?

Mr. Lassagne: Yes.

Mr. Boyken: Which claim is that? [118]

Mr. Lassagne: Claim 2, I believe.

A. No, the Stuart structure, the defendant's structure, does not include that specification, for this reason—and that is really the essence of the entire invention. I will demonstrate with Defendant's Exhibit H. If I apply a force to tilt that structure from its normal stable position where the tanks are upright until the lower ring or supporting base engages the floor or supporting member and remove my hand, the unit will immediately and definitely return to its first stable position. I would like to demonstrate that with a large model also to show how it corresponds to the small model which we have produced as Defendant's Exhibit H.

Q. Please do so.

A. I am now applying a force to Plaintiff's Exhibit 7 to tilt Plaintiff's Exhibit 7 from its normal vertical position to a point at which the outer edge

(Testimony of William A. Doble.)

or periphery of the lower base member engages the aluminum plate on the floor. Now, I will raise the tank-holding mechanism and it will be noted the manner in which the unit returns to its one and only stable position.

Defendant's device does not include the structure which you have read because it does not meet with that definite specification set forth in that portion of the claim, namely, that the unit will have a second stable position, and to make the unit have a second stable position the Josephian device of the patent definitely proportions either the diameter of the circular [119] track or the height or depth to which the circular track projects below the lower surface of the base plate. That is a definite relationship with the periphery of the lower plate. Now, that must be maintained in a certain order so that you can obtain the claimed features of the Josephian patent, namely, that when the device is rocked from its first stable position, the center of gravity may traverse the point of contact of the circular track and then move to a second stable position. That is totally missing from defendant's structure, as I have demonstrated. It will not stay in a second stable position. It has no second stable position.

The Court: Q. Before you leave that, irrespective of the claim of the patent, what is the mechanical difference between the two rings?

A. That is a good point, your Honor. The mechanical difference is that the right on defendant's

(Testimony of William A. Doble.)

device is made substantially with less height, so that the center of gravity will not swing over the contract point 17. There is a definite mechanical limitation so that that structure cannot be put in a position where the device swings to a second stable position.

Q. If the ring that is on the defendant's device were widened so that the proportion would be the same, as in the case of plaintiff's device, it would result in the center of gravity that would enable it to have the secondary position of plaintiff's device?

A. That is the point. It takes a minor [120] change in the structure to bring about that advantageous feature, which is the claimed feature, and which is the essence of that patent all the way through.

Q. The fact that there is a flat surface on the bottom of the ring of the defendant's device is immaterial?

A. It is immaterial. That could be a ring just as well.

Q. If this were a rounded surface but of the same width, it would have the same effect as it has with a flat surface?

A. Yes, your Honor. Defendant's device is made with the depression in the bottom plate because it is an economical, inexpensive, readily fabricated base.

Q. Do you mean it would be easier to make this round surface than a flat surface?

(Testimony of William A. Doble.)

A. No, your Honor, it is just as easy to make it either way. With a flat surface it has this advantage: You have a better support. Say on a wooden floor you have a little more supporting area with a flat surface than you would have with a ring such as used in the Josephian structure where it is round, and you only have a line contact with the supporting surface instead of a flat broad surface such as defendant's structure has.

Q. I will ask this next question with some hesitation, because I am afraid your Honor may regard it as too elementary, but I think it is highly desirable for the record.

The Court: Don't take that for granted, because you will remember that famous story about the lawyer who went to the [121] Supreme Court and who wanted to tell the judges about some simple statutory provision, and the judges said, "You do not have to tell us about that. We know that."

The lawyer said, "I made that mistake in the court below and I want to be sure about it."

So you go ahead and ask the elementary question.

Mr. Lassagne: Q. I would like to have you explain, Mr. Doble, with reference to this text entitled, "Experimental Mechanics", published by Macmillan & Company, in 1888, what is meant by the term "Center of gravity of an object"?

A. Referring to the text entitled, "Experimental Mechanics", published by Sir Robert Stallwell Ball in 1888, defines the center of gravity as follows, and I am reading from page 57:

(Testimony of William A. Doble.)

“Center of Gravity. We proceed to an experiment which will give an insight into the curious property of gravity. I have here a sheet of iron, Fig. 27. Five small holes, A, B, C, D, and E, are punched at different positions on the margin.”

Q. I suggest that you refer to the blackboard diagram which we have drawn from the book.

A. I have drawn on the blackboard a diagram which in a way corresponds to Fig. 27 in the book. My diagram is not quite perfect, but it represents what the book is talking about. The five small holes in the plate are indicated by A, B, C, D, and E, and those are around the margin of an irregular, say, sheet metal plate. [122]

“Attach to the framework a small pin, from which I can suspend the iron plate by one of its holes A. In back of the plate there is a supporting structure which is a small pin, which projects through the hole A in the plate. The plate is not supported in any other way. It is free to swing. It hangs freely from the pin, around which it can easily turn. I find there is one position, and only one, in which the plate will rest.”

In other words, ending the quotation for the moment, there is only one position with the pin A and the plate at which it would rest. That would be a stable position.

Continuing with the reading:

“If I now withdraw it from that position it will return there after a few oscillations.”

In other words, it will be like a pendulum. If

(Testimony of William A. Doble.)

the plate were swung to either side, it would swing back and forth until it again returned to its point of equilibrium, and I might interpose here that in swinging the plate, each time you will be lifting, which will later be pointed out as the center of gravity. Force must be applied to lift that center of gravity from its stable point.

“In order to mark this position I suspend a line and plummet from the pin.”

Interposing again, I indicate on the blackboard a line extending from A down to a weight. [123]

Continuing with the reading: “Having rubbed the line with chalk”—in other words, we rub the line with chalk—“I allow the line to come to rest in front of the plate. I then flip the string against the plate and then produce a chalk mark. This, of course, traces out a vertical line A-P.”

The point P is the center point, which I have now indicated on the sketch on the blackboard.

“I now remove that plummet and suspend the plate from the last hole B.”

We will now remove the plate, take it off, and move the plate until point B engages the pin in the same manner.

“I repeat the process, thus drawing a second chalk line B-P, and so on with the other holes,” until we get five lines on our plate.

“and thus obtain five lines across the plate represented by dotted lines in the figure. It is a very remarkable circumstance that these five lines all intersect at the same point P.”

(Testimony of William A. Doble.)

I am trying to draw the five lines so that they will all intersect at the point P.

"This remarkable point is called the center of gravity of the plate, and the result at which we have arrived may be expressed by saying that the vertical line from the point of suspension always passes through [124] the center of gravity. At the center of gravity P a hole has been bored, and when I place a supporting pin through the hole you will see that the plate will rest indefinitely in all positions. This is a curious property of the center of gravity. The center of gravity may in this respect be contrasted with another hole Q."

And then in the figure the author draws a small hole Q to the side of the P, which I will now place and so designate on the blackboard.

"The center of gravity may in this respect be contrasted with——"

I guess I did not start reading in the right place——

"The center of gravity may in this respect be contrasted with another hole Q, which I have just drawn, which is only an inch distance from the hole P. When I suspend the plate by this hole—that is the hole Q—it has only one position of rest. That is, when the center line P is vertical beneath Q. Thus the center of gravity differs remarkably from any other point in the plate."

In other words, if we put a pin through the hole Q, the plate will immediately swing down until the vertical line extends through P to Q.

(Testimony of William A. Doble.)

Q. Now, Mr. Doble, what is the position of the center of gravity [125] of the Josephian unit illustrated in his patent drawing controlling in determining whether the unit will be stable in its tilted position as shown in Fig. 3 of the patent drawing?

A. Referring to Fig. 3 of the Josephian patent and pointed out on the enlargement thereof on the easel, it will be observed that the vertical line from the support passing through the center of gravity 15 lines between the contact point 17 of the track 11 and the contact line of the bottom plate 20, with the same support 16. Therefore, the structure will rest stably and definitely in that position until a force is applied which will cause the center of gravity to rise about the point 17 if the unit is tilted toward its first stable position or rise from a point acting as the hinge at 20 if the unit is swung all the way over. In order to cause the center of gravity to rise, it requires force, either manually or by some other means, and therefore a stable position is arrived at when the center of gravity reaches its lowest point with relation to the support and requires a force to lift that center support for moving it to shift its location between those two points.

Q. In the Stuart device, Plaintiff's Exhibit 7, when it is moved to the position where the edge of the tank supporting plate and the depression portion of that plate are both in contact with the supporting floor, where is the center of gravity of that unit?

(Testimony of William A. Doble.)

A. The center of gravity of that [126] unit—I can illustrate on the same Figure 3—would not lie between the points 17 and 20, but would lie between the point 17 and the center line of the track. It would probably be at a point which I will indicate on this drawing at “30,” because in the Stuart structure we do not have the circular track so proportioned in relation to the periphery of the lower plate 8 that the center of gravity can be swung to a point beyond the point of contact of that circular track with the support. It at all times remains on the center side of that track contact with the support.

Mr. Lassagne: Inasmuch as the witness has illustrated his testimony by marking on this enlargement of a sheet of the Josephian patent drawings, I would like, with Mr. Boyken’s consent, to offer it in evidence as defendant’s exhibit next in order.

The Court: Hasn’t that been admitted?

Mr. Lassagne: No, this was merely illustrative before.

The Court: Let it be marked.

(The document was received in evidence and marked Defendant’s Exhibit I.)

Mr. Lassagne: Q. Now, referring to the drawing which was admitted in evidence yesterday as Plaintiff’s Exhibit 6, which purports to represent the defendant’s structure, have you made a comparison of that drawing with the blueprint of the

(Testimony of William A. Doble.)

defendant's device which is in evidence as Defendant's [127] Exhibit E?

Mr. Boyken: Your Honor, this is pointless.

The Court: Yes, I do not think you need to go into that. He said it was not accurate as to dimensions. The blueprint which you offered, and the testimony supported it, showed it was inaccurate. I think with that statement in the record there is no point in taking up the time on that. So far as accuracy of dimensions is concerned, the court will consider the blueprint which you have produced. Counsel's exhibit is only to show generally how it looked rather than being an accurate portrayal.

Mr. Lassagne: Your Honor, it is more than a question of dimensional accuracy. It is a question of the relative proportion of parts, which is extremely important in this case, and that drawing to me is so obviously, in the light of three or four answers, I can elicit here evidence of the over-reaching of it. I feel it extremely desirable to have a very short point on it.

The Court: You can do it, but you are protected in the record by the statement of the court and the statement of counsel, and the models are before the court. I can see what the models look like. It seems to me you are fully protected in the record on that, so that it is unnecessary to point out on the diagram something that is admitted already, namely, that it is not clear—— [128]

Mr. Lassagne: Just the extent of departure then. I will cut it down to take as little time as possible.

(Testimony of William A. Doble.)

The Court: Have the witness it does not correctly represent the proportions, or something of that kind, if you want that.

Mr. Lassagne: Q. Understanding that you have made a comparison of this drawing, Mr. Doble, with the blueprint of the defendant's device in evidence as Defendant's Exhibit E, will you indicate with reference to the illustration of the depth of the depression in defendant's base plate, with reference to the diameter of the plate, what percentage of exaggeration there is present in this drawing, if any?

A. I have made the comparison which you have stated and I find an error of $58\frac{1}{2}$ percent in the depth of the depression in the plate shown in Fig. 4 on that exhibit.

Q. Will you mark on the exhibit with pencil the particular dimensions to which you have referred and the percentage of its exaggeration?

A. I have now marked on Plaintiff's Exhibit 6 the dimensions from the lower side of the base plate to the bottom of the deformed portion of that plate, and I find an error or exaggeration there of 58 and approximately a half percent, which might materially change the mode of operation of defendant's structure.

Q. Now, Mr. Doble, considering particularly the basal member fastened to the bottom of the base plate of the patented device, [129] on the one hand, and the tank-supporting plate with its circular depression embodied in the defendant's device on the

(Testimony of William A. Doble.)

other hand, is it your opinion that they perform substantially the same function in substantially the same way to obtain the same results, or that they perform different functions, or in a different way, or produce a substantially different result?

Mr. Boyken: Isn't that the conclusion of the court, really, that determines the question of infringement? I do not mind hearing this witness' opinion on it, but it seems to me the question is incompetent, because that is just what the court is to decide.

Mr. Lassagne: It is a question on which the witness is expected to assist the court, because they are all mechanical and engineering considerations.

The Court: I think it does somewhat invade the province of the court, but let him answer.

The Witness: The defendant's structure is structurally different. It operates by a different mode of operation and produces a different result.

Mr. Lassagne: You may cross-examine.

The Court: We will take the morning recess at this time.

(Recess.) [130]

Cross Examination

Mr. Beckley: Q. Mr. Doble, I show you again Defendant's Exhibits B-1 through B-4, which I believe you testified were units in use at the Western Pipe and Steel Company; is that right?

A. That is correct.

Q. I believe you also testified that you had seen those types of devices in operation?

(Testimony of William A. Doble.)

A. Yes, I have.

Q. Can you tell me whether or not the tanks which are shown on those photographs were manifolded together?

A. Some of them were, not all of them.

Q. Are the tanks which are shown in those photographs all of the same type?

A. No. The unit is equipped with four tanks for oxygen and one for acetylene. The acetylene tank is a little larger in diameter and a little shorter in height.

Q. So those have not been manifolded together?

A. No. The acetylene would not be manifolded with the oxygen, but the four oxygen tanks would be manifolded together. In some of the units I saw they had all tanks of oxygen and none of acetylene in each carrier.

Q. Where did you see those units?

A. At the same place.

Q. Where was that?

A. The plant of the Western Pipe and Steel Company, South San Francisco.

Q. At what time was that?

A. Time of day or time of year?

Q. No. Time of year?

A. I made a note of that. It was on [131] February 8 and we arrived——

Q. Of what year?

A. Of this year, 1946; we arrived at the plant at two o'clock.

(Testimony of William A. Doble.)

Q. The units which you saw were all single in February of this year?

A. That is correct.

Q. In moving those units about how was that accomplished?

A. In transporting them or conveying them the unit was provided with an "I" at the upper end of the standard and lifted by a crane. However, if they were to be moved an inch or so the operator could move them the same as these units are moved, by edging over the device.

Q. They were actually tilted and rolled?

A. Well, you don't have to tilt those to roll them. You inch them over to alignment onto the pipe line. That would only be about the distance, not a considerable distance.

Q. Are you referring now to plaintiff's Exhibit 7 and plaintiff's Exhibit 8?

A. Yes. I can demonstrate what I mean by shifting them without tilting.

Q. You can shift them without tilting?

A. Without materially tilting them, yes.

Q. I wonder if you would demonstrate that to the Court?

A. I would be very glad to. First I will demonstrate on Plaintiff's Exhibit 7. If the manifolding pipe was slightly out of line with the valve the unit can be switched or shifted on its base by applying a twisting force to the edge. That is [132] the way it is usually moved. When they are spotting a unit in the plant to line it up with the manifold

(Testimony of William A. Doble.)

in the same way I now shift the plaintiff's device, Plaintiff's Exhibit 8, in the same way an operator may shift the carrier of the unit at the plant of the Western Pipe and Steel Company which are shown in Defendant's B-1 to B-4.

Q. On your direct examination you were demonstrating to the Court that Defendant's Exhibit G could be rolled along if it was desired to move that unit either in the model or in a full sized unit on the lower track, and I would like to ask whether or not the defendant's device could not be rolled along in that same manner on the track along the depression, the lower portion of this base plate?

A. No, it can't in the same manner, for as I pointed out, the particular feature of Josephian's device is to provide proportioning of a track with relation to the periphery of the base so the unit may be tilted until the center of gravity is directly over the contact point of that track with the support. Then it requires merely a turning action to transport that to the new locality, whereas in Defendant's structure, and I will demonstrate with Defendant's Exhibit H, which is a rather small model of Defendant's commercial device, the bottom plate is not proportioned with relation to the periphery of the outer plate to enable accomplishment of that result. In other words, in defendant's device it cannot be tilted until the center of gravity [133] reaches the point of contact with the depression referred to. Therefore, unlike Plaintiff's device that merely may be twirled and in twirling

(Testimony of William A. Doble.)

Defendant's Exhibit G for transportation, Defendant's unit in being rotated must always be maintained in its tilted position. It requires two forces against a single force to advance the unit along the ground.

Q. When I asked the question to which you have just given this statement I don't believe that I mentioned anything about the center of gravity. I asked you whether or not the defendant's device could be rolled along the depression at the bottom of the base plate while it was tilted to transport it from one place to another?

A. I believe you said in the same manner. It is not transported in the same manner.

Q. Will you answer the question I just asked?

A. Answering your new question, Defendant's device may be rolled on its point of contact of the depression with the support by the operator applying force from two directions.

Q. How much force is this new additional force which you apply? I believe you stated on direct examination that that might be as small as five pounds?

A. That is not correct. I stated it might be as low as six pounds. Demonstrating with Defendant's Exhibit H. that holds the model in the tilted position under the most favorable conditions that we were able to arrive at, it required six to eight pounds force. However, in moving the unit, rotating the unit, it would not be advisable [134] to tilt it to the position which the periphery of that lower plate

(Testimony of William A. Doble.)

engaged the support and engages the ground; it would be better to balance the unit something in that position, which would require a greater force (demonstrating). However, the units are never transported that way. They are always transported by a truck.

Q. You say they are never transported that way?

A. Any distance, yes. Just a foot——

Q. What do you mean by any distance?

A. I mean across the room here. It is much easier to transport them on your truck.

Q. They may be transported a couple of feet in that way, though?

A. They could be.

Q. You were speaking in your direct examination on the position of a line through the center of gravity when either the defendant's or the plaintiff's units are in a tilted position. If we refer to Defendant's device when it is resting both upon the track and the periphery of the base plate—you marked on Defendant's Exhibit I a Point 30, at which you said you thought probably the line through the center of gravity would pass. Let me ask you whether or not you have made measurements on Defendant's device to determine the exact position of this center of gravity?

A. No, I have not, but by demonstrating you could very clearly or very easily see. I am now demonstrating with Defendant's Exhibit H. In tilting that unit we never arrive at a point where the unit tends to balance on the [135] edge of the depression which contacts the supports. It always will

(Testimony of William A. Doble.)

return to its fixed or permanent stable position. Therefore, the center of gravity is not reached. In swinging from a central position to such a point as the Point 17, referring to Defendant's Exhibit I, it must lie between the Point 17 and the center of depression. It cannot lie on that point of contact or beyond it. It must lie within it.

Q. How far within the periphery of the track does it lie? A. I don't know.

Q. Have you any idea?

A. No, I don't have an idea. However, it is some little distance because of the action you get upon releasing the tank——

Q. You never carried on any experiments to tell where that might be?

A. No, I have not.

Q. As a matter of fact, you can't find the center of gravity of the defendant's device by the method which you demonstrated on the board?

A. No, you would not obtain the center of gravity that way. That was a simple illustration of what that center of gravity is and how it acts.

Q. You referred in your direct examination to the term used in the patent, "the second stable position". Would you define that for the Court, what you mean by "the second stable position"?

A. Yes; I would be glad to define what I mean. I will take the patent's definition for it.

Q. I am asking you for yours.

A. Well, I agree with the [136] patent. It

(Testimony of William A. Doble.)

doesn't matter what I—it is what the patent says. I agree with what the patent's definition is.

Q. Will you give the Court your definition of "the second stable position"?

A. I will read my definition from the patent.

Q. All right.

A. I will read from Page 2, first column, starting at Line 59:

"In any event, the advantageous result of my invention can be accomplished by so designing the lower plate and its attached track, so that there will be a second stable position, such as that shown in Fig. 3 after the tank has been tilted. This simply means that the center of gravity 15 is to lie between vertical lines erected from Contacts 7 and 20".

That really means 17 and 20, it must be a typographical error.

Q. Does that mean to you that the advantageous result could not be accomplished in any other way?

A. I don't understand your question.

Q. I am asking, reading from the patent—I am not reading from the patent, but "the advantageous result of my invention can be accomplished" by doing these things which you have read. Does that mean that it cannot be accomplished in any other way?

A. No, it cannot be accomplished in any other way that I know of and comply with the terms of the patent and its clear [137] specifications.

Q. I am not asking you that. I am asking if in accordance with your definition of the term "the

(Testimony of William A. Doble.)

second stable position” whether the patent in the portion which you have just read means that the advantageous result of the intention could not be accomplished in any other way than is defined in that specification.

A. I don’t know that I should speculate on any other ways that the stable position may be obtained. The patent defines how a stable position is to be obtained. That is the teaching in the patent. That is the teaching, the way it ought to be done. Whether it may be done some other way is immaterial. I am not interested in it.

Q. You don’t know whether it can be?

A. I have never investigated it.

Q. Does the term “stable position” to you mean a position of rest?

A. Yes, position of rest such as shown in the patent.

Q. Will it require a force to be exerted to move that?

A. From a position of rest? If it is not at rest——

Q. It is not stable?

A. Not as defined in the patent.

Q. Can you show me where “stable” is defined in that patent to mean that the device is at rest?

A. Yes. Figure 3 shows the device at rest. In that figure it is shown in a stable position.

Q. Can you find where it says that Figure 3 is the only position [138] in which it is stable?

(Testimony of William A. Doble.)

A. No. It has two positions in which it is stable. Figure 1 shows it in another position.

Q. Can you find the definition in the patent where it says that the stable position is one at rest and can be no other?

A. Not in those words, but the drawings and the specification define a structure which can have no other interpretation.

Q. I believe in qualifying you as an expert witness you stated that you were a major in ordnance; is that right; or had for some years been in charge of ordnance work for the Army?

A. During the First World War I was a lieutenant assigned to ordnance work. In the Second World War I was assigned to ordnance work as a major and then lieutenant-colonel.

Q. What were your duties there?

A. My duties were varied. During the first portion of my duties with the San Francisco Ordnance District in the Second World War I had charge of the Production Service Branch of the Industrial Division from June 1, 1943, until the end of the war. I had charge of manufacture of 105 millimeter gun carriages at the San Jose manufacturers.

Q. Are you familiar with the operation of, was it 95 millimeter——

A. 105.

Q. 105 millimeter guns?

A. Not particularly. I am interested in the manufacture, not in the use.

Q. Have you ever seen one fired?

A. No, I have not.

(Testimony of William A. Doble.)

Q. Have you examined the barrel of one?

A. Yes. [139]

Q. Was it rifled? A. Yes.

Q. What was the purpose of that, do you know?

A. Certainly.

Q. What was it?

A. To give the projectile a rotation.

Q. Once the projectile is in flight would you say it is stable?

A. No, it is not stable.

Q. What is it?

A. It is unstable, it is subject to gyrations. It is moving forward and it is also rotating and it is gyrating, all at the same time. Certainly it is not stable.

Q. It is not stable?

A. No. It varies. It is continuously changing its course with the force of gravity acting on it at all times during its projectory. It is a nice mathematical problem to figure out which we haven't carried out in——

Q. Then you are familiar with their projectile flights? A. To a minor extent.

Q. Do I understand you to mean that because the projectile is moving forward it is not in a stable position?

A. No, it is not in a stable position. It is continuously changing direction. It is an ever changing position in any direction.

Q. I am not asking you that. I am asking whether it is in a stable position?

(Testimony of William A. Doble.)

A. I will say it is not in a stable position. It is in a changing position, continuously moving.

Q. The rifle barrel of which you spoke, why was that barrel rifled?

A. They are rifled to give the projectile a rotation [140] which tends to keep the projectile from rolling over and over, end onto end. It tends to keep it more in a direct path. However, that operation is not perfect. It tends to correct the situation, it makes the firing of the gun a great deal more accurate than if you did not have it rifled.

Q. You would not say it increased the shell's motion in flight?

A. Yes, it does. It tends to cut down the gyrations of a shell, not cutting down the flight.

Q. Then it is more stable than it would be without the rifling?

A. Certainly, but it is not stable in any sense of the word; merely more stable in a sense of something that is continuously changing.

Mr. Beckley: That is all.

Redirect Examination

Mr. Lassagne: Q. Is the fact alone that this unit, Plaintiff's Exhibit 7, will not stand in tilted position when you take your hand off it, sufficient proof that the center of gravity is not moved outwardly from the center of the unit beyond the point of contact of the depressed portion of the base with the floor?

A. It is an absolute proof that the center of

(Testimony of William A. Doble.)

gravity has not moved beyond that point or has not even approached it.

Q. Now, with respect to whether the center of gravity under those conditions is positioned on the line, the point of contact 17, as the point is indicated in the Josephian patent, or [141] whether it is an infinitesimal fraction of an inch inside of that or an infinitesimal fraction outside of that, is that difference in position of the center of gravity just a matter of degree, or is it critical in determining the mode of operation of the holder?

A. It is critical in determining the mode of operation as clearly demonstrated by Defendant's structure which will not maintain a second stable position, and as demonstrated by Plaintiff's structure, which will maintain a second stable position. That is brought about by the passing of the center of gravity over the point of contact of the Track 11 with its supporting structure at the point 17.

Mr. Lassagne: That's all. [142]

Recross-Examination

Mr. Beckley: Q. Mr. Doble, do you know how much you would have to increase the depth of the depression on the bottom of the defendant's device which is in evidence as Plaintiff's Exhibit No. 7 before the center of gravity would fall outside the periphery of that depression when it was resting on the edge of that depression and on the edge of the base plate?

A. No, I have not made that determination.

(Testimony of William A. Doble.)

Mr. Beckley: I would like the record to show that Plaintiff's Exhibit 7 is now resting with the edge of the depression on an aluminum plate on the courtroom floor and with the edge of the base plate on the courtroom floor, and that the aluminum plate——

Mr. Lassagne: Do you wish to be sworn? I suggest that you put that in the form of a question to the witness.

Mr. Beckley: All right.

Q. Mr. Doble, do you see the position in which Plaintiff's Exhibit No. 7 is now resting?

A. Yes, I see that position. It is not a normal position.

Q. Will you explain to the court for the purpose of the record the position which it now occupies?

A. May I get down and look at it?

Q. Surely.

A. I have examined Plaintiff's Exhibit 7, which is the Stuart holder, which has been placed in a position by Mr. Beckley, in which position the edge of the dish portion [143] of the base plate is resting on an aluminum plate, which in turn is resting upon the courtroom floor. The unit is overhanging the aluminum plate and is tilted until the peripheral edge of the dish plate engages the linoleum of the courtroom floor, thereby increasing the angle of tilt so that the center of gravity has passed over the point of contact of that dish portion and now lies between that point of contact of the dish por-

(Testimony of William A. Doble.)

tion and the peripheral edge of the supporting plate.

Q. Will you state whether or not the unit is resting in that tilted position with no external forces being applied to it? A. That is correct.

Q. Will you state the approximate thickness of the aluminum plate on which you said the dish portion rested?

A. I can measure it and give you a more exact figure than guessing at it.

Q. Will you do that, please?

A. I have applied a scale to the edge of the aluminum plate, and as closely as I can tell, the plate is approximately $3/16$ of an inch thick.

Q. Would you say, Mr. Doble, that Plaintiff's Exhibit 7 is now in a stable position?

A. Yes, it is.

Mr. Beckley: That is all.

The Court: Q. That means that if the basal member were thickened by $3/16$ of an inch on the defendant's device it would come to rest in the same manner as plaintiff's device does? [144]

A. Well, yes, to this extent, your Honor. I do not think that was quite a fair test, but it does show the critical height of that basal member.

Q. Putting it in plain simple language, it is just a matter of how thick it is?

A. That is right, how thick, or how large in diameter. You can vary it in either of two ways, either by thickness or diameter.

Q. The defendant's device, to use a boyhood ex-

(Testimony of William A. Doble.)

pression, teeters and then comes to rest; the defendant's device comes to rest in a secondary position; that is right, isn't it?

A. That is correct, your Honor, if it is moved.

Q. Is there any particular advantage, one against the other, in either one of those methods of so-called security?

A. Mr. Josephian seems to think it is quite an advantage in his particular structure.

Q. I am asking you, does it make any difference? The device of the defendant moves but it comes back to rest in its original position; the device of the plaintiff moves and at some point in its movement it stops and comes to rest there. There isn't a great deal of difference there from the utilitarian point of view, is there?

A. Yes, I think there is quite a good deal, your Honor, in this: If we notice, we will tilt defendant's exhibit H, which is the small model, and we will release it. That is, I gave it its maximum tilt, released the unit, and it swung back and forth. I can tilt [145] the small model of plaintiff's structure, which is Plaintiff's Exhibit G, a similar amount and it will also teeter back and forth. Now, the utility in the invention of Josephian's in that we can tilt his farther and thereby bring the center of gravity directly over the point of contact of the basal member, as you call it, your Honor, and therefore the operator can wheel that along the ground with less effort.

Q. And then this is better?

(Testimony of William A. Doble.)

A. This is a better device in that respect, yes.

Q. And the defendant's device is not quite as good?

A. It is not as good in that respect and we do not use it. The defendant does not use that, your Honor. The whole thing is this: When he wants to move his device he uses a hand truck. The patented device, to move it, he wheels it along the ground. They both have a different mode of operation and use, and in order to get the wheeling effect safely, Josephian provides that second stable position so that if he happens to release the unit, that is, the operator releases the unit as I am demonstrating this Defendant's Model G, when the center of gravity is beyond that point it will come to a second stable position and not tip over on him.

Q. This so-called second stable position is not of much importance from the utilitarian point of view, is it? The main utility is in the ease with which the device is moved, isn't it?

A. That is a safety feature, your Honor, which has utility [146] in being a safety factor.

Q. It is not nearly so important as the other?

A. As being moved?

Q. Yes.

A. I think they both have equal importance. These cylinders are heavy, and if it tips over on a man——

Q. They both come back to the same position?

A. But they do not, your Honor.

Q. I mean they both have a means of being made

(Testimony of William A. Doble.)

secure—put it that way. In one case the thing teeters back to its original position, and in the other, if it is moved over it will stay in a non-vertical position?

A. I think you have the same thought we have.

Q. I am not sure about that. I just want to find out.

A. However, the important thing is that is what the Josephian patent calls for. That is the thing he asked for and that is the thing the Patent Office gave him, is just the difference between the demonstration of those two models. His invention is based on that demonstration of stability.

Q. If that is correct, if a man makes a model and if it does not operate quite so good as the fellow who had the patent, he escapes the result of what might be called infringement?

A. That would be true if he got the same result, but you do not get the same result. You do not get the advantages in the Stuart shop because Stuart are not interested in the advantages Mr. Josephian has. They do not move their unit [147] by rolling. They have a specially-made truck, and operators are lazy. The easiest way is to move it by hand truck.

Q. Wouldn't he, the defendant, be better off to have the basal member in the same way, constructed in the same way that the plaintiff's member is constructed?

A. No, because they do not use it, your Honor.

Q. It would not do them any harm?

(Testimony of William A. Doble.)

A. It wouldn't do them any good, and there is no utility in having it.

Q. You say the plaintiff's device moves a little easier. There would be that advantage?

A. The plaintiff's device has advantages the defendant's device does not have, if you try to follow the mode of operation of the plaintiff's device. But defendant's device does not operate that way. They do not use it that way. They use a hand truck to move it.

Q. They could use a hand truck with the same kind of basal member the defendant has, couldn't they?

A. They could, but they do not, and that is the difference. These two structures illustrate the difference between——

Q. I can see there is a difference——

A. That is the difference the patent is addressed to.

Q. Would it be advantageous to the defendant to use the same type of basal member?

A. No, he has a better basal member for his use, because it is a flat surface which won't dig into a soft platform. [148]

Q. I had not heard anything about that, so far. Do you think there is some disadvantage to the type of basal member that is on the plaintiff's device in actual use?

A. Well, I have not experienced any disadvantage, but naturally it has only a line contact where the cylindrical pipe engages the ground, where de-

(Testimony of William A. Doble.)

defendant's device has a flat surface which engages the ground and gives a far greater supporting area so it won't tend to imbed in a soft platform. Personally, I do not see any utility in plaintiff's structure. It is a hypothetical patent and the patent is addressed to a structure which has a second stable position, and that is the essence of the invention. The whole invention is addressed to that.

Q. Isn't the mobility just as important?

A. No, your Honor, for this reason: The only reason that defendant has a basal member which elevates the base from the ground is so he can get his truck under it in the same way that the Home platform had legs on it to lift it from the ground so they could run under it one of the lift trucks to move it.

Q. Would it be a fair statement to say that both devices have a definite element of stability that is their attribute, and in addition the plaintiff's device has more mobility?

A. Yes, that is true. That is a fair statement. Plaintiff's device has features which the defendant's device does not have.

The Court: I am sorry to have asked so many questions.

The Witness: It has been a pleasure, your Honor. [149]

The Court: Any further questions?

Mr. Lassagne: No further questions.

The Court: That is all.

Mr. Lassagne: The defendant rests.

(A recess was taken until two o'clock p.m.)

Afternoon Session, May 1, 1946, 2:00 p.m.

Mr. Beckley: Before proceeding, your Honor, I would like to move that the aluminum plate which was used in the demonstration just before the noon recess be introduced in evidence under the same stipulation as Plaintiff's Exhibit's 7 and 8 were introduced, that is a photograph be substituted.

The Lassagne: Satisfactory.

The Court: Very well.

(The photograph of the aluminum plate was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Boyken: I only want to ask the plaintiff a few questions.

WILLIAM JOSEPHIAN,

called in rebuttal on behalf of the plaintiff; previously sworn.

Direct Examination

Mr. Boyken: Q. Do you ever use a hand truck with rollers on the truck or wheels on the truck in order to move around your unit such as is in evidence here, Plaintiff's Exhibit 8? A. Yes.

Mr. Lassagne: We object, your Honor. Plaintiff's Exhibit 8 is not the device disclosed in the patent. The issue is confined to what is disclosed in the patent. Nowhere does the [151] patent say

(Testimony of William Josephian.)

anything about moving it with a hand truck. The commercial practice is irrelevant.

Mr. Boyken: We have been talking about it all through this trial. The commercial embodiment of the patented device is always relevant.

The Court: I think it came up here by some of your witnesses as to what was done.

Mr. Lassagne: It is relevant, of course, what the defendant is doing, because it is the defendant's acts that are charged with constituting an infringement, but whether or not the plaintiff is using——

The Court: Plaintiff described in the direct examination how the device was used. It might not, strictly speaking, be rebuttal. I will overrule the objection.

Mr. Boyken: Q. Do you understand the question?

The Witness: Yes.

Mr. Boyken: It was answered.

Q. Under what conditions do you use a hand truck for moving the unit?

A. The hand truck is used whenever there is a great distance to travel, such as on and off the truck in the plants where there are quite a few feet to move around. If there is any great distance to move we use a hand truck to move the unit with.

Q. Under what circumstances do you dispense with a hand truck and merely use the circular track at the bottom of the unit [152] for moving the unit?

A. As you——

(Testimony of William Josephian.)

The Court: He has already covered that.

Mr. Boyken: I have just one point in mind.

The Witness: As you see, there is a valve, outlet valve on this unit.

Q. You mean this valve I have my hand on?

A. Yes. That has to be connected to a copper pigtail at the customer's premises and occasionally, or quite often the unit is placed in the truck in such a way when they are ready to put it on the hand truck, to put it on the line, the valve is turned around or in the opposite direction. In that case the unit is brought into position for the connection where it makes to the pigtail, or if there is a short distance of several inches, up to a foot or two one way or the other, it can be done on the rolling ring.

Q. You also saw the device off the stand moved here in the courtroom by turning it around, did you not? I am talking about the device which is in evidence here, I believe, as one of the exhibits—this one? A. Yes.

Q. You can roll that around without the cylinder?

A. Yes. You don't need a truck for it.

Q. Under normal conditions what kind of a floor do you move these units over, is that an even floor or is it sometimes uneven?

A. Well, the floor is very unstandard, so to speak. You get all kinds of floors, you get them very [153] rough, rough concrete, rough wood up to smooth concrete floors, but hardly any two of our

(Testimony of William Josephian.)

jobs are alike. It may be smooth one month, it may be rough the next month.

Q. Do you have planked floors at times that you move the units over? A. Yes.

Q. Are these floors, let me say, out to the extent of three sixteenths of an inch?

A. Certainly; that is not great.

Q. That is not unusual?

A. That is not a great difference, no.

Q. Those would be normal conditions, would they not, in which these units are moved?

A. Yes.

Q. Floors of that kind? A. Yes.

Mr. Boyken: I have no further questions.

Mr. Lassagne: Neither have I.

Mr. Boyken: All right, Mr. Josephian.

HERBERT E. METCALF,

called in rebuttal on behalf of plaintiff; previously sworn.

Direct Examination

Mr. Beckley: Q. Your name is Herbert E. Metcalf? A. Yes.

Q. Where do you reside, Mr. Metcalf?

A. In Los Angeles.

Q. What is your address there?

A. 5959 Citrus Avenue.

Q. What is your occupation?

(Testimony of Herbert E. Metcalf.)

A. I am a patent attorney; [154] not an attorney at law.

Q. How long have you been a patent attorney?

A. Since 1931.

Q. Do you know the plaintiff in this case, Mr. William Josephian? A. I do.

Q. How long have you known him?

A. Since December, 1941.

Q. Would you tell the Court the occasion of your first meeting him?

A. I went over to Mr. Josephian's plant. At that time I was a member of the firm of Lippincott & Metcalf, who were prosecuting patent applications here in San Francisco, and I went over to Mr. Josephian's plant to see a device which he thought might be patentable.

Q. What occurred at that time and what device did Mr. Josephian show you?

A. Mr. Josephian showed me a device very similar to that which is shown in the patent drawing in the patent in suit, No. 2,317,064.

Q. What was the purpose of Mr. Josephian asking you to come to his plant?

A. He wanted me to see this device and do whatever experimenting I desired with it and to file a patent application on it.

Q. Did you do that? A. I did.

Q. Is that the application for the patent which ultimately issued as U. S. Patent No. 2,317,064, which is here in evidence as Plaintiff's Exhibit 1?

A. That is correct.

(Testimony of Herbert E. Metcalf.)

Q. At the time you went to Mr. Josephian's plant was there a model which was demonstrated to you?

A. I would hardly call [155] it a model. I think it was a device, the device itself as he had built it up, with the seven tanks on it.

Q. As shown in——

A. As shown in the patent drawing.

Q. Since that time have you also become familiar with the commercial embodiment of that device, an example of which is here in evidence as Plaintiff's Exhibit No. 8?

A. I have.

Q. Have you also become familiar with the device of the defendant which is in evidence as Plaintiff's Exhibit No. 7?

A. I have.

Q. What were the circumstances under which you became familiar with the defendant's device?

A. I desired to make measurements of the forces required to pull the unit over to the point where it would become upset and I wasn't able to make those measurements on Mr. Josephian's device in Mr. Josephian's factory. I was also able to find a device which I believed to be the defendant's device at the American Forge Company plant in Berkeley. The device which I saw was labelled "Rack No. 65" and had four oxygen tanks on which the numbers were S-84419, 52985, 77173, 3353, and they bore the name of the Stuart Oxygen Company.

Q. That device which you saw at the American Forge Company, was it the same device as is here

(Testimony of Herbert E. Metcalf.)

in evidence as Plaintiff's Exhibit 7 and which I now show you?

A. It was not the same device, but it was built, as far as I could see, in an identical manner. [156]

Q. During the course of these tests what measurements did you make on the device, the defendant's device and the plaintiff's, both?

A. I had a spring scale and I measured the forces which were required to overturn the device in both cases and under as nearly as I could the same general circumstances. When we arrived at the plant the particular unit was in a corner of a platform which was very rough.

Q. Are you speaking of the defendant's or the plaintiff's device?

A. I am speaking of the defendant's device. It was in a corner on a very rough wooden floor. The measurements did not appear to be easily made in the corner, so I personally rolled on its so-called depression this unit into the open portion of the platform, a distance of approximately eight feet, in the manner of tilting the device and rolling it easily on the edge of the depression. I then endeavored to find a level place, or at least, substantially level place on the platform. The boards were so uneven, however, that without using the measurement on a single board, tipping it so the device would *like* on a single board, the measurements were incorrect. There was one place where the device would just balance itself in the resting position in the manner that was shown here prior to the noon recess.

(Testimony of Herbert E. Metcalf.)

Q. Was that in the same manner as when the plaintiff's Exhibit No. 7 was resting upon the depression on the aluminum plate and the periphery of the base on the courtroom floor? [157]

A. That is correct. The device was then put on a board that was substantially level and pulls were made in the outward direction.

Q. Will you demonstrate that to the Court, how you made those measurements and where you applied these forces?

A. Yes. Before I do that, however, I would like to state why these measurements were made in this direction without going into the patent any more, which you are thoroughly familiar with, your Honor. The patent states that there will be a sudden force applied to move this from its central resting position. Then particularly on the plaintiff's device, there is another place where it can be easily moved from place to place by rolling. Then there is another place there that hasn't been brought out thoroughly heretofore. There is another place where another advantage, a sudden force is to be applied to this device before it will come way over to this point and then falls over. The object of the invention is two-fold; first, that the device shall be easily moved from place to place and, second, that it shall not fall over, completely over and injure the operator.

The patent states in two places that there shall be a first force to move it out of the resting position where it is square with the floor.

(Testimony of Herbert E. Metcalf.)

Q. How did you measure that force?

A. I used a spring scale and attached it to the center of this plate, or guard, or [158] whatever you wish to call it, on top of the device.

Q. In which direction did you make the pull?

A. I pulled outwardly because it is quite apparent that the thing which the inventor was trying to do was to make the device first easily movable and then stable. With respect to overthrow of the unit, whether it was stable as far as the inward direction is concerned is not particularly important. If you let go of it and it comes back, it comes back. If you push it back here it comes back. That is not the important thing. The important thing is will this device fall over and will it injure the man who is handling it.

Q. When you say you pulled outwardly, do you mean by that you pulled outwardly in a horizontal direction?

A. In a horizontal direction to find the force necessary first to move it into the position where it was easily movable and, second, to go beyond that point and find out the forces which were needed to be used in order to overturn the unit.

Q. Did you measure the force required to tip the unit to the various angles of tilt until it came to the position at which further tilting would upset it?

A. I did.

Q. Do you have the values which you measured?

A. I do.

Q. Did you make a chart of those values?

(Testimony of Herbert E. Metcalf.)

A. The chart was made under my direction and of the values that I obtained.

Mr. Beckley: I ask the chart which I hand the clerk be [159] marked for identification Plaintiff's Exhibit 11.

(The chart of values obtained in measurements of plaintiff's and defendant's devices was thereupon marked Plaintiff's Exhibit 11 for Identification.)

Mr. Beckley: Q. I hand you Plaintiff's Exhibit 11 for Identification. Is that the chart to which you have just testified? A. That is correct.

Q. Will you explain, Mr. Metcalf, what that chart shows?

A. On this chart there is plotted the forces required to completely overthrow the unit from its vertical position. On the two units which I measured the force required to start the motion outwardly started at around 40 pounds, about 45 pounds with the defendant's device taking slightly less force to displace it from the central position and on this chart the red line indicates the force required for the defendant device and the black line that required for the plaintiff's device. The force then decreased very rapidly as the angles of tilt increased until a low point was reached in both cases. In the defendant device this low point registered as close as we could measure it, as I could measure it, about 7 pounds. Then continuing, because here is the point where the seven pounds——

The Court: I wish the witness would just give

(Testimony of Herbert E. Metcalf.)

me the facts in connection with the matter because I know you gentlemen are going to argue the matter. Just give the result.

Mr. Beckley: All right. [160]

The Witness: Then the force rose to about 50 pounds in the defendant device and then decreased again until it went down to zero on the tip over. So there were two applications of force, one to pull it out of the central position and another large application of force to move it on over. In the plaintiff's device there are also two applications of force, one to pull it over into a position where the force becomes negative; in other words, it stays in this position. Then the force rose to about 25, 26 pounds, to pull it on over into the tip over position. The only difference between the two is that one, the defendant's device, would not remain in this position but would fall back into the central position, but it would not under any circumstances fall on over into the tip over position without the application of this much higher force.

Q. Mr. Metcalf, when you refer to a high point of force in the defendant unit, was the second application of force greater than the first?

A. It was by about four or five pounds, something like that.

The Court: The difference was about 45 to 50?

The Witness: A. Yes, the difference between the two devices, the tip over is about 25 to 50. Those figures in the patent with the larger device, that with the seven cylinders, the force required for

(Testimony of Herbert E. Metcalf.)

complete tip over is greater than the initial force, but in the smaller device in the plaintiff's device it is a little lower. [161]

Mr. Beckley: Q. Mr. Metcalf, did you hear the testimony of Mr. Doble which was given here this morning in the discussion which he gave of the definition of the word stable and the phrase which is used in the patent, "the second stable position"?

A. I did.

Q. As that word stable is used in the patent in suit what is the meaning, the intended meaning as used there and as defined in the patent?

A. In my opinion, it is used there to define the fact that this device, the plaintiff's device, is stable in the direction of overthrow; that is a position where a sudden increase in force is required in order for it to overthrow. Whether it stays in that position or whether it returns to central position I don't believe makes any difference.

Q. Is the term stable a relative term or is it a term which has but one and only one meaning?

A. In my experience, stability and the word stable depend wholly on the direction you wish something to be stable. Various machines are stable in certain ways and unstable in others. A certain device certainly does not have to be motionless or fixed to be stable. Automobiles, for example, are stable but can overturn, but you can drive them and they will still be stable. An airplane is stable in four different categories. [162]

(Testimony of Herbert E. Metcalf.)

[Printer's Note: Part of following question missing in copy.]

* * * though moving and turning?

A. That is correct. The rifling in a rifle barrel is made for the specific purpose of spinning the projectile out and it will be longitudinally stable. In other words, it will stay straight in the direction that it is going, irrespective of how it deviates in the air.

Q. What would be the effect without the rifling?

A. It would go end-over-end and would not go nearly as far as it normally would.

Q. The definition which you gave just a minute ago of "the second stable position," in respect to that can you find support in the patent for that particular definition which you gave?

A. If your Honor will permit me, there are two short quotations from the patent, page 2, line 11, it states:

"If the unit is then tilted by hand, for example, the tank can tilt into a second stable position as shown in Fig. 3, without the application of any great amount of force."

That is a relative term, because the whole device weighs, this particular device, close to a thousand pounds on the seven tank affair. 35 pounds is not a great amount of force to tilt a thousand-pound device. Then it states that "Under these conditions, a second and preferably greater application of force will be necessary in order to tilt the plant

(Testimony of Herbert E. Metcalf.)

laterally, so that the center of gravity" passes outside, etc., to [163] the tipover.

Q. Referring, Mr. Metcalf, to page 2 of the patent, column 1, line 59—incidentally, you drafted this application, did you not? A. I did, yes.

Q. And chose the word "stable" which is used in here? A. That is correct.

Q. In this paragraph to which I have referred which ends at the top of column 2 in line 3, is the intention there to indicate that that was the only way in which that advantageous result could be achieved?

A. Certainly not. It says that it can be attained in that manner and as has already been pointed out here, there are certain advantages in having a resting position in these two positions.

Q. But is it your understanding that those advantageous results could be obtained by other combinations of dimensions also?

A. That is correct, as long as there will be in the tilted position a force barrier which will prevent this device from tipping over on the operator.

Mr. Beckley: That is all. You may cross examine.

Cross Examination

Mr. Lassagne: Q. In Fig. 3 of the patent drawing, Mr. Metcalf, you caused to be made a diagram illustrating the center of gravity of the Josephian unit as lying between the vertical lines erected from the point of contact 17 and the point of contact 20?

A. Correct. [164]

(Testimony of Herbert E. Metcalf.)

Q. When the center of gravity is in that position the unit is stable as against outward movement?

A. Certainly.

Q. Isn't it also stable as against inward movement? A. Yes.

Q. Stable as against moving both ways?

A. Yes, sir.

Q. At the top of page 2, column 2, you say, "This simply means that the center of gravity is to lie between vertical lines erected from contacts 17 and 20." A. Correct.

Q. The "this" that you refer to—what was "this"?

A. In the first place, I am still describing the preferred movement illustrated and it is preferable to have the second stable position to be stable in both directions.

Q. You do not disclose in the patent diagram or teach there in any other way of obtaining the advantageous result, do you?

A. No, because the patent statute says you give one preferred form of an invention and that is all that is necessary.

Mr. Lassagne: That is all.

Mr. Beckley: Before closing, I would simply like to introduce into evidence the chart which has already been marked for identification Plaintiff's 11.

Mr. Lassagne: No objection.

The Court: Very well.

(The chart, Plaintiff's Exhibit 11 for Identification, was thereupon admitted in evidence.)

The Court: Any further questions of the witness?

Mr. Beckley: No further questions. Plaintiff rests. [165]

The Court: Do you claim without this last clause in that second claim that this is not an invention? Is that the point?

Mr. Lassagne: Yes, that the last clause must be read as a material limitation in the claim.

The Court: Without it, it does not disclose invention but it would be a progress in the art?

Mr. Lassagne: It would be skill in the art to put a bump on the bottom of the Western Steel device so you can wrestle it around more.

The Court: But with this last clause in it you do not claim that it is not an invention?

Mr. Lassagne: With the last clause in it, it is plainly not infringed. I think I can show you that.

The Court: No, with the last clause in it, is it invention?

Mr. Lassagne: We do not contest whether it is invention or not. I would be willing to admit that for the purpose of this case.

The Court: You say if that last clause was left off you would contest it; you would say it does not consist of invention?

Mr. Lassagne: It does not involve any invention whatsoever over the Western Pipe and Steel device, which it is admitted to have been in the prior art. Mr. Boyken by his questioning of Mr. Doble certainly implied——

The Court: That is, the secondary position is in your opinion the thing that make it an invention. If it were absent it would not be an invention. I wanted to get that quite clear.

Mr. Lassagne: Yes, that is my contention, that is my position. If that second stable position had not been recited, the Patent Office would never have granted a patent.

The Court: I will put it colloquially. The device would not fall over as long as there was a ring underneath it that was of such thickness and thinness as would either cause it to remain in an upright position, a secondary upright position, or that would cause it to teeter back to its original position?

Mr. Lassagne: You would get stability in the sense the device would not fall over.

The Court: You would get the same general results, would you not?

Mr. Lassagne: You would get the same degree of safety against overturning, yes.

The Court: That is what Mr. Boyken mentioned when I was thinking about that matter when he was talking. You would get the safety against overturning, stability against overturning. I have forgotten what the phrase was that he used.

Mr. Lassagne: But the phrase "stable position" as used in the patent specification and its claims is a different thing from stability in the general sense of stability against overturn.

The Court: Is it? That is the problem I am thinking about.

Mr. Lassagne: That is the problem, yes. [203]

The Court: Is there any particular virtue that the patent speaks of that results just in this position?

Mr. Lassagne: Yes.

The Court: What different virtue is there in that position so far as stability is concerned than in this position (indicating)?

Mr. Lassagne: So far as stability is concerned, none. But when you select that part of your range that the plaintiff has selected and claimed in this patent you combine safety against overturning with maximum ease in rolling the thing from place to place.

The Court: It may be the defendant's device is safer because it gets back to the upright position when it is tipped. That extended might be an improvement over this device.

Mr. Lassagne: It may be superior. We think it is, of course.

The Court: Now, isn't that a dangerous position for you to assume?

Mr. Lassagne: No.

The Court: Because then you would have to start from the point where you were improving on someone else's invention.

Mr. Lassagne: Not at all, because a superior device may be either an improvement on something else or may be something different than the other thing.

The Court: To the extent that it makes use of the other [204] man's claim, would it infringe even

though in the process of infringing it would improve?

Mr. Lassagne: Oh, if you come within the scope of a man's patent claims and then add something by way of improvement, unquestionably you infringe.

The Court: Frankly, I think that is what your difficulty is in this case. [205]

The Court: The object of the invention is in reality that when the device is maneuvered and moved that if it is tipped it will remain in a safe stable position. [210]

Mr. Lassagne: In a condition of safety.

The Court: Along comes Mr. Josephian and he devises this ring by which it is protected from falling over. Now, your client makes that ring a little narrower with the result that it does not tip over because it comes back to its original position. The object of the invention is not to perform some example with mechanics or mathematics. It is to accomplish a desired result, isn't it, and shouldn't we measure these bursts of genius we have in terms of what they are aimed at rather than to prove some mathematical formula or mechanical formula?

Mr. Lassagne: That would be true under a claim of a scope embracing that, but it is not a narrow view. Take in this case, because the patent is not for any and all means of accomplishing the object: To so interpret this patent would convert it into a patent for a result rather than a patent for a means of accomplishing a result.

The Court: You do not think that the main object of this invention was to create a sort of Leaning Tower of Pisa? I mean there is nothing to be accomplished by having a group of cylinders get themselves into this position, except it might have created some conjecture as to why that is, but the object is not to do that. The object is to get this thing in a stable position so it won't fall over. The way that is done is this. Surely the inventor did not have in mind all he was going to do was to bring about a situation where he could display to the [211] trade these devices set up in this position because that would not interest them. What possible profit could that bring about? It has been said he could not sell the object in that way. That would not be persuasive. No salesman could gain anything by saying, "My boss, Mr. Josephian, has got a set of cylinders that he is able to stand up on edge that way". That would not aid him at all. It seems to me the thing we have to consider is what is the object, what is the main thing you are aiming at? [212]

The Court: Would you like to argue this case some more or present a memorandum? I ask you that because I have a rather strong feeling in this case I ought to decide it in favor of the plaintiff.

Mr. Lassagne: I understand that.

The Court: I feel that way about it because looking at it from a rather common sense practical point of view the device your client made was built in the same way, uses the [218] same ring, and makes a little difference in the ring, and unquestionably

he wanted to use it for the accomplishment of the same objectives of stability and maneuverability. I am not impressed by the argument that this particular ring, when the defendant knew about plaintiff's patent and what he was using it for, was put there for the purpose of facilitating the use of a truck, to get it on the truck. That does not particularly impress me. Apparently this is not the kind of case where the Court is particularly required to go into the invention phase of the matter. As Mr. Boyken has said, it is not some revolutionary thing like the atomic bomb, but in its small way it appears to be a practicable and new way of handling these things. Your claim adopted that slight variation of the same plan, and it appeals to me that it is a case in which an injunction should be granted. I do not know whether there would be any purpose of any accounting. There isn't any sale of these devices. It is just a facility in the handling, the conduct of a man's business. Maybe an injunction might be sufficient. I do not know. You gentlemen may have more to say about that. But that is the way the case appeals to me and I think it is better to tell you that, so that if you think there is any more than you can add to it, I want you to have the opportunity to do that. It is better that I do that than just exhibit a frozen face to you and not tell you anything I am thinking about. [219]

The Court: I understand that argument all right, but, after all, Congress has said that judges have to decide these patent claims, these patent

cases, and all I can do is the best I can with them. I have said that in several decisions. I have to make a sort of informed guess in these matters and it appeals to me in this case, having in mind the point of law that you make there, that it is too narrow an [221] interpretation that you put on the effect of this claim. While it is true the defendant can only get the benefit of what he claims, when it comes to the matter of interpreting the meaning of what he has claimed, then I think on that phase of the matter your contention presents too narrow a view of the meaning of the claim. It seems to me that part of the claim only describes the effect rather than the object of the invention. Now, I may be wrong about that, but it seems to me that the claim should be interpreted in a case like this with at least sufficient liberality to give some reality to the invention rather than to make it a sort of illusory thing that anyone could change an "i" or cross a "t" there to get away from it. I think the evidence in this case and all the exhibits justify a more liberal interpretation of the claim. I agree with you that the inventor cannot get more than he claims. [222]

Monday, August 12, 1946

Mr. Boyken: This is a motion, your Honor, to vacate the approval of a supersedeas bond that was filed in this case, which bond was to stay the injunction. We also asked for an order fixing the terms upon which the injunction would be stayed.

I think your Honor will recall the circumstances of this patent case, involving a cluster of oxygen tanks, and the patent, as you will remember, was held to have been infringed, but the [1] Court declined to award any damages to the plaintiff. After that the defendant made a motion for permission to file a counter claim setting up declaratory relief, and that motion was denied. The morning we argued that motion, after your Honor denied it, there was some talk about the supersedeas bond and the staying of the injunction, and I suggested a \$5,000 bond. I am perfectly satisfied with that amount. I am not trying to increase it in any respect. However, the bond that was filed in order to stay this injunction reads to me as though it were just an ordinary cost bond, and your Honor did not allow any damages during the period of time up until the decree was entered, and it will be, of course, very difficult to prove any damages from the time of the decree of this Court until the Court of Appeals decides this case, maybe a year or more hence. The appeal has been proceeding in a rather leisurely manner. And so we are asking for some terms and conditions upon which that injunction may be stayed. Under the Federal Rules, which apply to District courts, the injunction may be stayed pending a determination of the appeal in the discretion of the Court, and any suitable terms may be interposed.

Now, these are the things that I think should be done: I want to submit them for your Honor's consideration. In the first place, the testimony

showed that there were a hundred of these devices in use, and when I suggested a \$5,000 bond I had in mind the number of devices that the defendant used [2] should remain at 100, and that they should not be increased, and I think it would be proper to limit the number of devices used by the defendant to the same amount that have always been used, pending the determination of this appeal.

Further I had in mind when I suggested that \$5,000 bond that it should be in the nature of, let us say, a penalty bond, if I can call it that. The way the bond reads, I do not think we could recover anything on the bond if the appeal was unsuccessful. That is the way the bond reads. What I am asking is that an order be fixed and the bond, in accordance with the order, should be in the nature of a penalty bond, that is to say, if the appeal is unsuccessful the plaintiff should be entitled to the \$5,000.

The Court: There is no authority for that kind of bond, is there?

Mr. Boyken: I was reasoning it this way: That bond, the way it reads now, seems to give the defendant, let us say, a free ride until after the appeal may be decided a year or so from now. If we were not entitled to any damages up until the time of the decree of this Court, either because they were too hard to prove or they were difficult to prove, or something of that kind—I do not know what your Honor's reasoning was on that, but we were satisfied with it—of course, we would not be able to prove any damages between the time the

decree was entered to the time the appeal was decided. [3]

The Court: I think the Court might fix some royalty, but I do not see how I could have the power to specify an amount of money without more, if the decreed were affirmed.

Mr. Boyken: Yes, your Honor, I think you could use your discretion and do anything you would like about that. The royalty arrangement would be satisfactory.

The Court: I felt there were no sales involved here, so the matter of damages would be a rather illusory thing. Of course, some reasonable amount could be fixed for the use of the idea, the patentable idea. In the event the decree were affirmed, of course, I think the plaintiff would be entitled to something for the use of the idea during the period of the appeal. I suggest—I do not know whether it would be agreeable to your opponent or not—that the wording might be, “In the event of the affirmance of the decree, the Court may fix some amount by way of the value of the use of the idea and by way of royalty during the period of appeal, not to exceed the sum of \$5,000.” The Court might fix that itself or have it determined by way of reference. I do not know if that is opposed by your opponent or not. That would seem to me, offhand, to be a fair way of protecting the rights of the Plaintiff during the appeal.

Mr. Boyken: The testimony showed that there were 100 devices of this kind and, of course, the testimony, as you will recall, showed that it resulted

in a saving to the defendant. [5] If the \$5,000 is adhered to, it is satisfactory to me, and with 100 devices, it would be in the nature of a royalty of \$50 each—not a royalty of so much per unit or damage per unit, but just as a fixed proposition it would \$50 apiece, which I do not think is excessive.

The Court: I do not think it would be wise to do that arbitrarily without hearing some testimony or having some record made as to the reasonableness of that. That could well be done, if the bond is up, upon the determination of the appeal, could it not?

Mr. Boyken: I would be satisfied with some kind of a hearing. If \$50 a unit per year is too high, I would be glad to listen to testimony in that respect.

The Court: Would you object to that procedure?

Mr. Lassagne: I think the entire thing is premature. The bond is up. If this were a case where profits continued to be made by the defendant out of the sale of the devices during the period the appeal was pending, and the decision were affirmed on appeal, we would then have a hearing as to what the plaintiff should recover on the bond. I think that is exactly what we should do here. The question of what is a reasonable royalty should be taken up after the appeal is decided.

The Court: I think Mr. Boyken's point is under the terms of the bond the Court might not be free to do that. [5]

Mr. Lassagne: I think the Court is free to do

that under the terms of the present bond. The terms of the present bond conform exactly to the provisions of the Rule 73(d), which states the conditions of a supersedeas bond in detail. It conforms exactly to that rule.

The Court: In what respect do you say it does not?

Mr. Boyken: Because that rule is intended to cover cases where the District Court has allowed damages or has allowed profits and damages, and then those damages need not be paid pending the appeal because of the bond. The difference between the usual case and this case is the Court has allowed no damages of any kind. Therefore there is no occasion for a supersedeas bond. We will have to go over it again. If the appeal is unsuccessful, we will go over the question whether or not the plaintiff is entitled to any damages between the time of the decree of this Court and the decision of the Court of Appeals. That is the distinction. There have been no damages awarded in this case. There is no money——

The Court: That is right.

Mr. Boyken: That is the difference between the usual case and this case. Therefore I am asking for some kind of terms staying this injunction, because, after all, the plaintiff is out as far as your Honor is concerned. There is no cost concerned because the bond covers cost. So I think there should be some royalty, or I suggest that this \$5,000 should [6] be considered a lump sum, and if the

defendant wants the injunction stayed, that should be the penalty for staying it.

The Court: Is there any real objection to the Court modifying the bond so it would provide in the event you lose on appeal then the Court might determine some reasonable amount not exceeding the amount of the bond to compensate for the use of the patent during the appeal?

Mr. Lassagne: I think the Court has that power, whether or not it applies to the present bond.

The Court: If you think it has, I do not think there would be any objection for your making that clear in the bond.

Mr. Lassagne: The bond is conditioned upon damages for delay, among other things. Recently—within the last two weeks, in fact—the patent statute governing action for infringing patents has been amended, or at least, both the houses of Congress have passed it and sent it to the White House for signature. It eliminates recovery for profits, for instance. It provides where infringement is found there will be general damages not less than a reasonable royalty. So that a reasonable royalty is merely one way of finding out what the damages are.

The Court: Suppose you lose the appeal, Mr. Lassagne. I do not want to put pessimistic ideas in your mind, but suppose you lose the appeal and your opponent comes here after. What relief would he be entitled to get under the bond? [7]

Mr. Lassagne: I think he would be entitled to a reasonable royalty during the period during which the appeal was pending.

The Court: Then there is no objection to making that clear in the bond if it is not clear now, is there?

Mr. Lassagne: No, but I think the reasonable royalty has to be set on the basis of testimony.

The Court: I think so, too. I do not think the Court should make any arbitrary award, but there should be some reasonable amount allowed by way of a royalty. I think if there is any doubt about it, that should be clarified in the bond, unless you are willing to stipulate that that is the interpretation of the bond.

Mr. Lassagne: May we not stipulate to that without going through the mechanics of vacating the bond, taking out a new bond, and all that sort of thing?

The Court: That is agreeable to the Court.

Mr. Boyken: I wrote Counsel a letter asking him to submit any order staying the injunction before the bond was filed, and he ignored that letter. There has been no response to that in any way.

Mr. Lassagne: This point was not raised in the letter, Mr. Boyken.

Mr. Boyken: I would prefer to submit an order, if Counsel approves of it, which would state the conditions upon [8] which this injunction is stayed.

The Court: You submit the order setting forth the conditions. Submit it to Mr. Lassagne for approval and I will sign it.

Mr. Boyken: I have an order here, but it treats

the \$5,000 as though it were a lump sum we were entitled to.

The Court: I would not do that. I think it would be fixed on the basis of some record made at the time, showing what would be a reasonable amount in the event the decree is affirmed.

Mr. Boyken: I will be glad to prepare such an order and submit it to Counsel.

The Court: Very well.

Mr. Lassagne: There is one further thing in Mr. Boyken's proposed order here on which I think we should get your Honor's thought. He asks that the supersedeas bond be effective for a period of only one year. It seems to me an appellee in a situation such as Mr. Boyken's client is has the right, if there is any undue delay, to ask the Appellate Court to increase or vacate the supersedeas bond.

The Court: I think you are right about that. I wouldn't want to determine that in advance.

Mr. Boyken: Yes, the \$5,000 was based upon one year, but if it is going to be a reasonable royalty, I will be glad to strike out that year and make it a reasonable royalty until [9] decision of the Court.

The Court: You prepare an order along those lines and submit it to Mr. Lassagne:

Mr. Boyken: Very well.

[Endorsed]: Filed Sept. 25, 1946. [9-a]

[Endorsed]: No. 11445. United States Circuit Court of Appeals for the Ninth Circuit. Stuart Oxygen Company, Ltd., a corporation. Appellant. vs. William Josephian. Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 16, 1946.

s/ PAUL P. O'BRIEN.

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11445

STUART OXYGEN CO., LTD.,

Appellant.

vs.

WILLIAM JOSEPHIAN,

Appellee.

APPELLANT'S STATEMENT OF POINTS
RELIED UPON ON APPEAL

The above-named appellant, pursuant to Rule 19, paragraph 6, of the rules of this Court, hereby states that the points on which appellant intends to rely on this appeal are as follows:

1. The District Court erred in interpreting the reference in the claims of the patent in suit to the device disclosed therein as having "a stable position" when tilted as applicable to defendant's device in which force must be exerted by the user to prevent the defendant's device from returning from tilted to upright position.

2. The District Court, in interpreting the claims of the patent in suit, erred in disregarding a clear definition found in the specification of said patent explaining the meaning of the expression "a stable position" as used in said claims.

3. The District Court erred in failing and refusing to conclude that the patent claims must be read in the light of the definition of a tilted "stable position" given in the patent specification, and that when so interpreted the claims specifically exclude defendant's device which will not stand tilted.

4. The District Court erred in finding identity of function in the patented structure and in the defendant's structure.

5. The District Court erred in finding substantial equivalency between the patented structure and the defendant's structure.

6. The District Court erred in failing and refusing to conclude that the making and using of the defendant's device in evidence was not an infringe-

ment of the claims in suit of plaintiff's patent, or any of them.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant-
Appellant.

ACKNOWLEDGEMENT OF SERVICE

Receipt of a copy of the foregoing Appellant's Statement of Points Relied upon on Appeal is hereby acknowledged this 16th day of October, 1946.

BOYKEN, MOHLER & BECK-
LEY,

/s/ W. BRUCE BECKLEY,
Attorneys for Appellee.

[Endorsed]: Filed Oct. 16, 1946.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF
THE RECORD ON APPEAL TO BE
PRINTED AND OF EXHIBITS AND
DOCUMENTS TO BE INCLUDED IN A
BOOK OF EXHIBITS

Comes now the appellant Stuart Oxygen Company, Ltd., and, pursuant to Rule 19, paragraph 6, of the rules of this Court, hereby designates the

parts of the record on appeal to be printed, as follows:

	Transcript
Paper	Page
1. The Complaint	1
2. The Answer	3
3. Defendant's Request for Admissions (omitting photographs attached thereto.)	
4. The original Reporter's Transcript of the evidence and proceedings at the trial, transmitted to this Court, with the following omissions: (Here follows a list of omissions and deletions).	
5. Order for Judgment	7
6. Findings of Fact and Conclusions of Law ..	8
7. Final Judgment	12
8. Notice of Appeal	14
9. Designation of Contents of Record on Appeal	16
10. Order Staying Injunction and Fixing Terms of Stay Bond	24
11. Supersedeas Bond approved October 2nd, 1946	28
12. Order Extending Time for Docketing Appeal dated August 27, 1946	23
13. Order Extending Time to Docket dated September 27, 1946	27
14. Order for Transmission of Original Papers and Exhibits	31
15. Clerk's Certificate	34

Transcript

Paper

Page

16. Appellant's Designation of Parts of the Record on Appeal to be Printed and of Exhibits and Documents to be Included in a Book of Exhibits.
17. Appellant's Statement of Points Relied upon on Appeal.
18. Writ of Injunction.

And appellant further hereby designates the following exhibits and documents to be included in a Book of Exhibits:

Appellee's (Plaintiff's) Exhibits

Exhibit 1, Josephian patent No. 2,317,064.

Exhibit 2, Photograph*.

Exhibit 3A, Photograph*.

Exhibit 3B, Photograph*.

Exhibit 3C, Photograph*.

Exhibit 3D, Photograph*.

Exhibit 6, Drawing of defendant's device*.

Exhibits 7A and 7B, Photographs substituted for Exhibit 7*.

Exhibits 8A and 8B, Photographs substituted for Exhibit 8*.

Exhibit 10, Photograph of aluminum plate*.

Appellant's (Defendant's) Exhibits

Exhibits A-1, A-2 and A-3, Photographs referred to in Defendant's Request for Admission No. 2*.

*To be reproduced by photostatic process.

Appellant's (Defendants) Exhibits—(Cont.)

Exhibits B-1, B-2, B-3 and B-4, Photographs referred to in Defendant's Request for Admission No. 3*.

Exhibits C-1, C-2, C-3 and C-4, Photographs*.

Exhibit D-1, Photograph substituted for Exhibit D.¹*

Exhibit E, Blueprint.*

Exhibit F, Drawing of hand truck.*

NAYLOR and LASSAGNE,

/s/ THEODORE H. LASSAGNE,

Attorneys for Appellant.

ACKNOWLEDGEMENT OF SERVICE

Receipt of a copy of the foregoing Appellant's Designation of Parts of the Record on Appeal to be Printed and of Exhibits and Documents to be Included in a Book of Exhibits is acknowledged this 16th day of October, 1946.

BOYKEN, MOHLER & BECKLEY,

/s/ W. BRUCE BECKLEY,

Attorneys for Appellee.

*To be reproduced by photostatic process.

¹Attached to stipulation re "Substitution of Photographs for Physical Exhibits."

[Endorsed]: Filed Oct. 16, 1946.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER RE BOOK OF
EXHIBITS AND OTHER EXHIBITS

It is hereby stipulated, subject to the approval of the Court, that there shall be prepared ten (10) copies of the Book of Exhibits prepared in accordance with the designation of the parties, four copies of which shall be filed with the Clerk of this Court; three copies of which shall be delivered to counsel for appellant; and three copies of which shall be delivered to counsel for appellee.

It is further stipulated and agreed that the Court upon approval hereof and of the form of Order, enter an Order herein in the subtended form.

NAYLOR and LASSAGNE,
/s/ THEODORE H, LASSAGNE,
Attorneys for Appellant,
BOYKEN, MOHLER & BECK-
LEY,
/s/ A. W. BOYKEN,
/s/ W. BRUCE BECKLEY,
Attorneys for Appellee.

Dated: October 16, 1946.

ORDER

Whereas, the parties hereto have designated as part of the transcript of record on appeal the reproduction of the patent in suit, certain photographs, and other exhibits, and it having been represented that the reproduction of the other documentary exhibits of secondary importance would

be difficult and costly, and that an Order has been made for the transfer to this Court of all original exhibits admitted into evidence during the trial of this cause, where said exhibits may be inspected in original form;

It Is Hereby Ordered that the foregoing stipulation be, and it is hereby approved; and that as part of the transcript of record on appeal there shall be prepared at least ten (10) copies of the Book of Exhibits provided for in said stipulation, which shall be deemed a sufficient compliance with the rules of this Court respecting reproduction of exhibits.

It Is Further Hereby Ordered that original exhibits which have been received in evidence and transmitted to this Court but not reproduced in the Book of Exhibits may be referred to by counsel for all parties herein in briefs and in arguments, and all or portions of said exhibits may be inserted in the appendices of any of said briefs and shall thereupon be considered by this Court as though reproduced in the Book of Exhibits; and that plaintiff's original Exhibits 7, 8 and 10 and defendant's original Exhibit D, or substantial duplicates thereof if the originals are not available, shall be present in Court at the time of argument and may be referred to by the Court and counsel.

/s/ WILLIAM DENMAN,

United States Circuit Judge.

Dated: October 18, 1946.

[Endorsed]: Filed Oct. 17, 1946.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF
ADDITIONAL PORTIONS OF RECORD

Appellee designates the following portions of the Transcript of Testimony in the District Court for inclusion in the record on appeal in addition to the matters designated by the appellant:

Page 193, line 13, to and including page 194, line 19 to the word "patent".

Page 203, line 4, to and including page 205, line 7.

Page 210, line 23, to and including page 212, line 9.

Page 218, line 18, to and including page 219, line 25.

Page 221, line 19, to and including page 222, line 15.

Appellee further designates that Plaintiff's Exhibit 9 shall be included and printed in full in the Book of Exhibits.

BOYKEN, MOHLER & BECK-
LEY,

/s/ A. W. BOYKEN,

/s/ W. BRUCE BECKLEY,

Attorneys for Appellee.

Dated: October 17, 1946.

Receipt of a copy of the foregoing "Designation by Appellee of Additional Portions of Record" is acknowledged this 17th day of October, 1946.

NAYLOR and LASSAGNE.

[Endorsed]: Filed Oct. 18, 1946.

In the United States District Court for the Northern
District of California, Southern Division

Civil Action No. 25286-G

Suit for Infringement of

Patent No. 2,317,064

WILLIAM JOSEPHIAN,

Plaintiff,

vs.

STUART OXYGEN CO., LTD.,

Defendant.

SUBSTITUTION OF PHOTOGRAPHS FOR PHYSICAL EXHIBITS

Pursuant to stipulation and subject to the Court's approval, the attached photographs are substituted herein for the physical exhibits introduced in evidence during the trial of the cause:

Photographs 7A and 7B substituted for Plaintiff's Exhibit 7.

Photographs 8A and 8B substituted for Plaintiff's Exhibit 8.

Photograph D-1 substituted for Defendant's Exhibit D.

The aluminum plate appearing in each of the photographs and upon which the physical exhibits are seen to be resting was introduced in evidence as Plaintiff's Exhibit 10. The photographs shall likewise be considered as a similar substitute for that exhibit.

It is further agreed that original Plaintiff's Exhibits 7, 8 and 10 and Defendant's Exhibit D may be withdrawn.

BOYKEN, MOHLER & BECK-
LEY,

/s/ W. BRUCE BECKLEY,
Attorneys for Plaintiff.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

Dated: May 13, 1946.

Approved:

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed U.S.D.C. May 13, 1946.

[Endorsed]: Filed U.S.C.C.A. Oct. 17, 1946.

